In the Supreme Court of the United States.

OCTOBER TERM, 1909.

WILLIAM BROWN AND LEVI B. GRITTS, on their own behalf, etc., appellants, *v.* THE UNITED STATES. } No. 604.

APPEAL FROM THE COURT OF CLAIMS.

MOTION TO ADVANCE.

On behalf of the United States the Solicitor-General respectfully moves the court to advance the above-entitled cause for hearing with the case of *Marchie Tiger* v. *The Western Investment Company et al.*, No. 242, for the following reasons:

1. In both of the above-entitled cases the constitutionality of the same and similar provisions of law is involved. In the *Tiger* case the questions presented are: (1) Did the act of April 26, 1906 (ch. 1836, 34 Stat., 137, 144, 145), extend the restrictions previously imposed upon full-blood Creek Indians as to the allotted land inherited by them? (2) If so, was it within the power of Congress, after land had been allotted to full-blood Indians of the

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Five Civilized Tribes subject to certain restrictions, to extend these restrictions?

The *Brown* and *Gritts* case presents the same constitutional question, and other questions of a like character affecting the validity of the same and similar provisions of law.

2. While Brown and Gritts, who were specially authorized by the act of March 1, 1907 (ch. 2285, 34 Stat., 1015, 1028), to maintain this suit to test the validity of provisions extending restrictions upon alienation, encumbrance, and the right to lease allotments, are full-blood Cherokees, and Marchie Tiger is a full-blood Creek, they are all full-blood Indians of the Five Civilized Tribes, whose status and peculiar relation to the United States are to be determined by an examination of substantially the same legislation.

3. The interest of the United States in both suits is substantially the same, although the *Tiger* case is on its face a suit between private parties.

4. Many thousand conveyances have been made in violation of the provisions extending the restrictions above referred to. The title to a large amount of land in Oklahoma, as well as the status of the Five Civilized Tribes, is therefore involved in these cases. Consequently a full and speedy determination of all the questions involved in said cases is a matter of much public importance.

LLOYD W. BOWERS,
Solicitor-General.

APRIL, 1910.

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lands inherited by them, and whether, if this be so, it was within the power of Congress to extend such restrictions. The present case is a suit specially authorized to be brought against the United States by the act of March 1, 1907 (chap. 2285, 34 Stats., 1015, 1028), to determine the validity of the act of April 26, 1906, above referred to, in so far as such act extends the restrictions previously imposed upon full-blood Cherokee Indians as to lands allotted to them. In both cases the Indians concerned are members of the Five Civilized Tribes whose status and relation to the United States are to be determined by an examination of substantially the same legislation.

Upon this motion the court advanced the present case and assigned it for argument on the first day of the present term, but without reference to the *Tiger* case.

Under these circumstances, and in view of the fact that the presentation of this case on behalf of the Government has lately devolved upon other counsel, who have not participated in the preparation of the brief or argument, it is respectfully suggested that the above-entitled cause be reassigned, and if so reassigned, that it be heard together or in connection with the said *Tiger* case, No. 60 of the present term.

Respectfully submitted.

WADE H. ELLIS,
Special Assistant to the Attorney-General.

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H. R. Doc. No. 552	57th Cong., 1st Session.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 331.

WILLIAM BROWN AND LEVI B. GRITTS, ON THEIR OWN BEHALF AND ON BEHALF OF ALL OTHER CHEROKEE CITIZENS HAVING LIKE INTERESTS IN THE PROPERTY ALLOTTED UNDER THE ACT OF JULY 1, 1902,

vs.

THE UNITED STATES.

ON APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANTS.

Statement of Facts.

This cause is pending in this honorable court on appeal from the judgment of the Court of Claims, dismissing the petition.

The suit was brought by the appellants, William Brown and Levi B. Gritts, citizens of the United States, who are also full-blood Cherokee Indians by racial extraction, alleging that they were vested with title in fee simple to the lands conveyed to them by the Cherokee People, under the Cherokee allotment act of July 1, 1902 (32 Stat. L., 716) (Ap-

pendix B), is sought to be taken from them by the United States without due process of law and without just compensation, under two certain acts of Congress hereinafter referred to, from which they seek relief.

Relief is asked in the same case for all other Cherokee citizens having like interests with them in property allotted under the said allotment act.

The suit is brought under the act of March 1, 1907 (34 Stat., 1015, 1028) (Appendix A), which authorizes William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens having like interests with them, to institute their suit in the Court of Claims to determine the validity of any acts of Congress passed since July 1, 1902, which seek to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens conveyed to them in fee simple, as provided by said act of July 1, 1902.

The pertinent portions of these acts are given in the appendix to this brief.

Prior to the allotment act the title to the lands involved herein was vested in fee simple in the Cherokees under a grant from the United States contained in the treaty of May 6, 1828 (7 Stat., 311), a grant which was ratified by subsequent treaties with the Cherokees in 1833, 1835, and 1846, and by a patent issued in 1838, in which patent the United States sought, however, to reserve unto itself an interest in the land, sometimes referred to by the courts as a "possibility of reversion" in case the Cherokee owners became extinct or abandoned the land. On account of the dissatisfaction of the Cherokees, the Treaty of 1846 secured all the lands to "the whole Cherokee people for their common use and benefit."

Under article 20 of the treaty of July 19, 1866 (14 Stat., 799), the United States agreed to cause the Cherokee lands to be surveyed and allotted among them as its own expense, upon request of the Cherokee National Council, and the

Cherokee allotment act was passed in pursuance of such request, the act providing in terms that it should not take effect or be of any validity until ratified by a majority of the votes cast by the legal voters of the Cherokee Nation (Rec., p. 20, Finding III).

The act was so ratified on August 7, 1902, and duly proclaimed August 12, 1902, thereby making it an agreement between the United States and the Cherokees (Rec., p. 20, Finding III).

Its purpose was to destroy the communal title of the Cherokee property and to allot and distribute the same in severalty among those Cherokees living on September 1, 1902, the date upon which such communal title was to terminate, and enrolled in accordance with the terms of the act.

The act of July 1, 1902, known also as the Cherokee agreement, provided that all enrolled Cherokees living on September 1, 1902, should receive their allotments of Cherokee lands, but that no child born thereafter to a Cherokee citizen should be enrolled or participate in the allotment; that an allotment should be land equal in value to 110 acres of the average allottable lands of the Cherokee Nation (sec. 11), out of which should be set apart to each allottee a homestead equal in value to forty (40) acres of such average lands (sec. 12), the remainder being commonly designated as surplus; that the agency for appraising the lands, enrolling the members of the tribe and issuing the allotment certificates to such members, should be the Commission to the Five Civilized Tribes, commonly known as the Dawes Commission (sec. 11), and to this commission was given exclusive jurisdiction to determine all matters relative to the appraisement and allotment of lands (sec. 22); that the allotment certificate should be conclusive evidence of the right of the allottee to the land therein described (sec. 21); that the Principal Chief of the Cherokee Nation should execute and deliver to the

allottee in whose favor such certificate was issued a patent conveying all the right, title, and interest of the Cherokee Nation, and of all other citizens, in and to the lands embraced in his allotment certificate (sec. 58), and that the conveyance, when made, should be approved by the Secretary of the Interior, and that such approval should serve to relinquish to the grantee all the right, title, and interest of the United States in and to the lands embraced in the patent (sec. 59); that the allottee by accepting the patent assented to the allotment and conveyance of all the lands of the tribe as provided in the act, and relinquished all right, title, and interest in and to allotments made to other Cherokees thereunder (sec. 60).

The patents provided were fee-simple deeds, granting to the allottees the whole estate owned by the Cheroke Nation (*i. e.*, Cherokee People), and all its citizens, in the land described therein, which grant was expressly subject to the following conditions, and none other, to wit:

1. That the homestead allotment should be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment (sec. 13).
2. That the homestead should be non-taxable, and should not be liable for any debt contracted by the allottee while held by him (sec. 13).
3. That neither the homestead nor the surplus allotment should be encumbered, taken or sold, to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of the act (sec. 14).
4. That the allottee should not, without the consent of the Secretary of the Interior, lease his lands for mineral purposes, nor for more than one year for grazing purposes, nor for more than five years for agricultural purposes, within the periods of inalienability above mentioned (sec. 72).

As stated above, these were the only conditions or limitations placed upon the allottee's power to use, control, and dispose of his allotment.

The allotment act was an agreement among the communal owners of the land for the extinguishment of the communal title and the vesting of the same in severalty in the individual Cherokees therein designated, namely, those to be enrolled and living on September 1, 1902; it made no distinction between the full-blood and mixed-blood as to the rigth each had to own, control, and dispose of his property acquired thereunder.

Appellants William Brown and Levi B. Gritts were enrolled, received their allotment certificates, and to them were issued patents to their respective allotments, executed in conformity with the provisions of the allotment act, and duly approved by the Secretary of the Interior (Rec., pp. 26-7, Finding XI).

Besides the lands acquired by appellant William Brown, as his own allotment, he, as sole heir of his son, Charles Brown, had inherited the lands allotted to Charles Brown, a duly enrolled member of the Cherokee Tribe, who had died September 1, 1904 (Rec., 27).

After appellants were so vested with title in their respective allotments and inherited lands, Congress attempted to increase and extend restrictions upon alienation, encumbrance, and right to lease the lands beyond those provided for in the act of July 1, 1902, by the passage of two acts, to wit:

1st. The act of March 11, 1904 (33 Stat., 65, Appendix C), by which the Secretary of the Interior was authorized to grant rights of way for the construction of pipe lines for oil and gas through the lands of the appellants for a period of twenty years, with the right of renewal for another period of twenty years, all without appellants' consent and without adequate provision for the ascertainment and payment of damages (Appendix C).

Under this act the Secretary granted such rights of way over the lands of appellants (Finding VII., Rec., p. 24).

2d. The act of April 26, 1906 (34 Stat., 137; Appendix

D), by sections 19, 20, 22, 23, and 25 of which the restrictions upon alienation, encumbrance, and the right to lease beyond those provided for under the allotment act of July 1, 1902, and are attempted to be increased or extended in the following respects, to wit:

a. The Cherokee full-bloods are made a distinct class from other members of the tribe, and, as such, are deprived of the power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to them until twenty-five years from the approval of the act of 1906, unless their restrictions are first removed by an act of Congress.

b. All leases and rental contracts of lands of full-bloods (other than homesteads), except leases for a period not exceeding one year for agricultural purposes, without the consent of the Secretary of the Interior, are declared absolutely void.

c. All lands of all allottees upon which restrictions have been, or may be, removed, whether such lands continue to be owned by the allottee or not, are made subject to taxation.

d. No full-blood Cherokee may convey, without the consent of the Secretary of the Interior, any land inherited from a deceased allottee in any of the Five Civilized Tribes, this inhibition being without limit in point of time, or location of the land within the territory of said tribes, and without reference to the person from whom the land is inherited, whether he was a full-blood, a mixed-blood, a freedman, or a white man, and also without reference to whether or not the land be inherited from one whose restrictions had been removed (Appendix D).

Under the Cherokee agreement such lands, if lying within the Cherokee domain, were alienable on August 7, 1907, and, if lying without the Cherokee domain, were not made subject to any restrictions upon alienation (Sec. 14).

The restrictions upon alienation of the surplus lands of appellant Levi B. Gritts have been removed; likewise the restrictions upon alienation of a part of the surplus lands of

appellant Brown (Rec., p. 27), thereby subjecting lands of both to increased encumbrance beyond that imposed under the act of July 1, 1902, and imposing restrictions upon his alienating, leasing, and otherwise disposing of his lands that did not previously exist.

c. No full-blood may lease his homestead, unless unable from infirmity or age to work or farm the same; and then only under rules and regulations prescribed by the Secretary of the Interior.

Other similar provisions, having for their purpose the increase of restrictions upon the appellant's right to own, use, and dispose of his property, are found in sections 23 and 25 of the act of April 26, 1906 (Appendix D).

The allotment act of July 1, 1902, under the terms of which these appellants took title, and the acts of 1904 and 1906, herein above referred to, may be contrasted as follows:

1. The act of 1902 contained no authority for the Secretary to grant rights of way for pipe lines for oil and gas through the lands of the appellants; but the act of 1904 confers authority upon the Secretary to grant such rights of way for forty years without the consent of the owner or adequate provision for ascertaining the reasonable value of such grant.

2. By the act of 1902 the homestead, if held by the allottee, was alienable after twenty-one years from the date of the certificate of allotment; but the act of 1906 forbids the full-blood to sell, dispose of or encumber it in any manner before April 26, 1931.

3. By the act of 1902 homestead allotments were made non-taxable for twenty-one years, if so long held by the allottee, and, in the event of the death of the allottee within the period of inalienability, said homestead would have descended to the heirs exempt from taxation until August, 1907; but by the act of 1906 homesteads became immediately taxable upon the death of the allottee or the removal of his restrictions.

4. By the act of 1902 surplus lands of appellants were alienable in five years after issuance of patent, but the act of April 26, 1906, declared that thereafter they should not have the power to sell, dispose of, or encumber in any manner such surplus until April 26, 1931. So, also, under the act of 1902, such surplus lands were not to be subject to taxation until the five-year period of inalienability had expired; but, by the act of 1906 such lands are made subject to taxation as soon as the restrictions are removed, even though the five-year period may not have expired.

5. Under the act of 1902 appellants received their allotments with the condition that they shall not be leased for grazing purposes for more than one year at a time, and for agricultural purposes for more than five years, without the consent of the Secretary of the Interior; but, by the act of April 26, 1906, full-bloods are deprived of the power of leasing their homesteads at all, except where from age or infirmity they are unable to work or farm the same, and surplus allotments of full-bloods may not be leased for more than a year without the consent of the Secretary of the Interior.

6. Under the act of 1902 the lands inherited by William Brown from his son Charles Brown were subject to the condition that rendered them inalienable until August 7, 1907; but, by the act of 1906 Wm. Brown is forbidden to alienate them forever without the consent of the Secretary of the Interior.

7. Under the act of 1902 inherited lands did not become taxable until five years from August 7, 1902; but by the act of April 26, 1906, they became taxable upon the death of the allottee or the removal of his restrictions.

After the approval of the act of April 26, 1906, the Secretary of the Interior prepared and promulgated regulations governing the leasing and sale of lands allotted to or in-

herited by appellants for the purpose of carrying into effect the foregoing provisions of the said act, thereby effectually subjecting appellants to the operation of the said restrictions (Rec., p. 25).

On December 21, 1906, appellant William Brown filed in the Supreme Court of the District of Columbia a bill attacking the validity of the act of April 26, 1906, and praying relief therefrom and to have the same declared to be in violation of the Constitution of the United States. But before a hearing on the application for writ of injunction could be had Congress passed the above-mentioned act of March 1, 1907, conferring jurisdiction upon the Court of Claims, with right of appeal to this court, to hear and determine this suit (Rec., p. 28).

By act of May 2, 1890 (26 Stat., 81), Congress had provided that the Constitution of the United States should have the same force and effect in the Indian Territory as elsewhere in the United States, and by the act of March 3, 1901 (31 Stat., 1447), had made appellants citizens of the United States, with all the rights, privileges, and immunities of such citizens.

The petition in this cause briefly sets forth the material facts, and contains special and general prayers for relief.

After traverse by defendants William W. Hastings, representing himself to be "the attorney-in-fact" for the Cherokee Nation (Rec., p. 19), filed an intervening petition in the Court of Claims, and was heard in argument at the submission of the case (44 C. Cl., 44) over the objection of appellants, who urged that the United States alone was proper party defendant, as provided in the act; that no recovery was sought against the Cherokee Nation; that the judgment herein could not affect the Cherokee Nation, and that there was no such body as the Cherokee Nation.

The findings of fact made by the court, seventeen in number, in addition to setting forth pertinent parts of the several acts of Congress involved in the controversy, includ-

ing the acts of July 1, 1902, March 11, 1904, April 26, 1906, and March 1, 1907, show that in 1838 there was a patent executed by the President of the United States conveying to the Cherokee Nation 14,374,135.14 acres of land, of which the lands involved in this suit are a part; that the Commission to the Five Civilized Tribes on May 11, 1900, began enrolling the citizens of the Cherokee Nation, were engaged thereat until March 4, 1907; on the first Monday of January, 1903, began allotting the lands to these citizens, and were then still engaged in the allotment of the same; that William Brown and Levi B. Gritts are the identical persons named in the act of March 1, 1907, are enrolled as full-blood Cherokees, have received allotment certificates and allotment deeds for their respective shares of tribal lands, both homestead and surplus, under the act of July 1, 1902, the findings showing the forms of such certificates and patents; that the restrictions upon alienation of a part of the surplus lands of William Brown and upon all the surplus lands of Levi B. Gritts had been removed; that William Brown, as heir of his son, Charles Brown, had inherited the latter's Cherokee allottment on September 1, 1904, either in fee simple or for life; that both the allotted and inherited lands of appellants are to a large extent suitable for both grazing and agricultural purposes.

The findings further set forth that in accordance with the act of April 26, 1906, the Secretary of the Interior prepared and promulgated regulations governing the leasing and sale of lands allotted to, or inherited by, full-blood Cherokee Indians for the purpose of carrying into effect the provisions of sections 19, 20, and 22 of the said act; that prior to the passage of the act many of the full-blood citizens of the Cherokee Nation had been induced by designing persons to execute deeds to their allotted lands and contracts to sell, and otherwise encumber the same in violation of the provisions of the act of July 1, 1902, and that since the passage

of the former act a large number of such deeds and contracts had been filed for record; that the full-blood enrolled citizens of the Cherokee Nation to whom lands have been allotted are, in the main, in favor of extension of the period of restrictions upon alienation, and are in favor of the supervision of the Secretary of the Interior over the leasing of their lands and the sale of their inherited lands (Rec., pp. 19-29).

The court in its conclusions of law, seven in number, before dismissing the petition, holds that the joint resolution of Congress approved March 2, 1906, and section 28 of the act of Congress approved April 26, 1906, operated to continue the tribal government of the Cherokee Nation for all purposes under existing law until otherwise provided by law, and were a recognition by the political department of the government of the United States of the existence of that tribal government, and that appellants, being still members of the tribe, were not emancipated from the control of Congress by the act of March 3, 1901, conferring upon them citizenship of the United States, and that, notwithstanding their citizenship and the fact that they own their allotments and inherited lands by fee simple title, subject only to conditions imposed under the act of July 1, 1902, it was a valid exercise of the authority of Congress to impose on the lands the additional incumbrances created by the acts of March 11, 1904, and April 26, 1906, and to impose upon appellants the restrictions upon selling, encumbering, leasing and disposing of his lands that are contained in the latter acts, and that the acts of March 11, 1904, and April 26, 1906, in so far as they, or either of them, attempt to increase or extend the restrictions upon alienation, encumbrances, or the right to lease the allotments of lands of Cherokee citizens, beyond those authorized by the act of July 1, 1902, are valid statutes.

The court, in an opinion delivered by Chief Justice PEELLE, holds that the several acts complained of are valid statutes, alleging that the restrictions thereunder are for the manifest benefit of appellants, in order that the latter may have the continued possession, ownership, and enjoyment of their lands until such time as the Government is satisfied that they are competent to repel designing men and manage their own affairs.

The opinion justifies the segregation of the full-bloods into a class different from the other Cherokees and the imposition of greater restrictions upon them, and of additional encumbrances on their lands, with the statement that the full-bloods in the main are in favor of the restrictions and of the supervision of the Secretary of the Interior, and the further statement that the full-bloods are an uneducated and a less civilized class.

The opinion is based on the theory that appellants are still tribal Indians, wards of the Government, and it is said, in effect, that the action of Congress in thus disregarding the fact that they are citizens of the United States, owning lands acquired in fee-simple, with allotment certificates and patents therefor issued under the act of July 1, 1902, is a just and wise exercise of power, rising above legal technicalities.

That appellants continue to be tribal Indians is predicated upon the alleged continued existence of the tribal government of the so-called Cherokee Nation, which, in turn, is predicated upon the joint resolution of Congress, March 2, 1906 (34 Stat. L., 822), and section 28 of the act of Congress, April 26, 1906 (34 Stat. L., 137).

Yet the opinion concedes that if appellants were separated from the tribe and were *sui juris,* competent to manage their own affairs, the acts complained of might well be held unconstitutional.

The opinion holds that appellants, although citizens of the United States under the provisions of the act of March 3, 1901, and although individual owners in fee simple of *pri-*

vate property acquired from the so-called Cherokee Nation under allotment certificates and patents issued in accordance with the provisions of the act of July 1, 1902, are not by those acts emancipated from Congressional control, either as to their persons or their private property, but that Congress had the power, by subsequent legislation, to impose the new restrictions against alienation, encumbrance, or leasing upon appellants, and to add incumbrances on their lands beyond those imposed under the act of July 1, 1902, without violating any constitutional right.

HOWRY, J., in delivering the dissenting opinion in the case, holds that lands once granted cannot be seized and controlled by the Government except in the exercise of the right of eminent domain, and adds that he is unable to accept the Government's contention that acts of Congress which attempt to do so are valid.

Admitting that the act conferring citizenship upon appellants did not alter the conditions which accompanied the original grant, he holds that when the land was once granted the character of the title allotted to the appellants was the same as if allotted to other citizens; the title of the one became as unqualified as the title of the other, and any attempt to differentiate between the fees so held can only be sustained upon the theory that the Indian can never acquire such a right to land as the Government is bound to respect.

The learned judge, in announcing this proposition, cites the fact that some of the ablest members of the United States Senate, holding the same views, had officially declared to Congress that the legislation known as the McCumber act (Sec. 19, act April 26, 1906) was not valid.

Referring to some of the findings of fact, deemed by him unnecessary and objectionable, as being calculated to mislead, Judge Howry discusses particularly the 14th finding, which

is to the effect that full-bloods "in the main" are in favor of the extension of the period of restriction upon alienation, etc., and, regarding this, he says that such controversies as this between the classes of allottees were concluded when the allotment act of July 1, 1902, was ratified, and he calls attention to the declaration on this point by Mr. Chief Justice Fuller in the Cherokee Intermarriage cases (203 U. S., 93), adding the following:

> "The partisan statements of the few individuals who have undertaken to testify, should no more influence the action of the court on the constitutional question than the report of the Senate Committee on the same subject (predicated upon two volumes of printed testimony) to the effect that the latter legislation was unwise and injurious to the Cherokees."

The history and character of the Cherokee title is carefully stated by Judge Howry, starting, as he does, with the grant contained in the treaty of May 6, 1828, instead of the patent issued in pursuance of the act of Congress of May 28, 1830.

If it be true, the opinion declares, that many of the full-bloods were induced to make contracts to sell or encumber their allotments in violation of the terms of the act of July 1, 1902, contingent upon the delivery of valid titles, those transactions do not concern this controversy, and the courts of Oklahoma are open to the grantors to set aside such contracts.

Discussing the question whether the legislation of April 26, 1906, amounts to a taking of property, Judge Howry holds that the effect of the legislation as to a part of the property involved is practically to convert a fee into a life estate, and amounts to an attempt to surrender to the law-making power the right of continued interference, not only as such interposition may affect the living generation, but future generations of Indians as well, in the control and enjoyment of private property held by as good a title as can be conferred by law.

Analyzing the several statutes complained of and their effect, the opinion says:

> "The exercise of Government authority, under the circumstances, also means the taking for public use of property without adequate compensation. In its last analysis the exercise of such Government authority means that private property is authorized to be taken for private use."

The provision authorizing additional taxation beyond that provided for under the act of July 1, 1902, is discussed and declared a violation of constitutional right.

The opinion holds that the rights involved did not come within the category of "technicalities," but are vested rights, and that where land is once granted the legislative power is incompetent to annul the grant, and that a State cannot impose a tax upon land granted with an exemption from taxation.

In the course of the opinion, the vested rights involved in the inheritance accomplished by the act of July 1, 1902, are discussed and declared to be as real as the rights of the original allottee.

The opinion, referring to the legislation complained of, concludes with these words:

> "If it be valid legislation there is no limit to the exercise of political authority over an Indian grant, no matter how ancient or how long held by the Indian beneficiary; and certainly there is a time when political control ceases to be plenary and lawful and can become arbitrary and unconstitutional."

SPECIFICATIONS OF ERROR.

The Court of Claims erred—

1. In its conclusion that the joint resolution of March 2, 1906, and section 28 of the act of April 26, 1906, operated to continue the tribal government of the Cherokee Nation.

2. In its conclusion of law that the enrolled citizens of the Cherokee Nation "were not emancipated from the control of Congress by the act of March 3, 1901, conferring upon them citizenship of the United States."

3. In the conclusion of law that notwithstanding the citizenship of appellants, and notwithstanding its conclusion of law No. 5 that appellants owned their lands in fee-simple, the extension of the period of restrictions upon alienation to twenty-five years from April 26, 1906, within which no full-blood Cherokee citizen can alienate, sell, dispose of or encumber his allotted lands unless his restrictions are removed by Congress, or lease or sell his inherited lands without the approval of the Secretary of the Interior, is a valid exercise of the authority of Congress.

4. In the conclusion of law that, notwithstanding the citizenship of appellants, and notwithstanding the conclusion of law No. 5 that appellants owned their lands in fee-simple, the act of March 11, 1904, and the act of April 26, 1906, in so far as they, or either of them, attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease allotments of lands of Cherokee citizens beyond those authorized by the act of July 1, 1902, are valid statutes.

5. In not holding that after appellants were vested with the fee-simple title to their Cherokee allotments and inherited lands, subject only to the conditions and restrictions imposed thereon by the act of July 1, 1902, Congress was without power to add other or further conditions, limitations

or restrictions upon their right to use, control, or dispose of the same, and was without power to impose further encumbrances thereon in the form of taxation.

6. In not holding that the act of March 11, 1904, accomplishes the taking of private property for private uses and is, therefore, invalid.

7. In not holding that the acts of March 11, 1904, and April 26, 1906, in so far as the said acts, or either of them, attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease their Cherokee allotments or inherited lands, attempt to deprive appellants of their property without due process of law, and are therefore invalid.

8. In not holding, in pursuance of its conclusion No. 6, that appellant, William Brown, is the only heir at law of Charles Brown, deceased, and as such the owner of the allotment made to Charles Brown, that Congress was without power, after such allotment was so inherited, to add conditions or place restrictions upon William Brown's right to lease or sell the same.

9. In dismissing the petition.

I.

TRIBAL GOVERNMENT OF THE CHEROKEE NATION.

Prior to July 1, 1902, the tribal government of the Cherokee Nation had ceased.

Its destruction was completed by the act of June 28, 1898 (30 Stat., 495), commonly known as the Curtis act.

Under the doctrine laid down in Jones *vs.* Meehan, 175 U. S., 1, appellants submit that it is not material to the issues in this case whether the Government of the Cherokee Nation existed on March 11, 1904, and April 26, 1906, or not; but because great stress is laid, by the Court of Claims in its opinion, on the continuance of tribal government, and because a brief accurate statement of the history of the Cherokee Government may conduce to a clearer apprehension of some of the more important points to be discussed, we set forth the following account of the subject:

This court will take judicial notice that the Cherokees as far back as 1839 had a constitutional government modeled after that of the United States, with a legislative, executive and judicial branch, a written constitution and written laws, recognized and respected by the Government of the United States as being sovereign, and exclusive in power, within the territorial limits of the Cherokee Nation, subject only to the Constitution and certain acts of Congress regulating trade and intercourse with the Indians.

Early in the history of our Government the Cherokees had by treaties placed themselves under the protection of the United States, and, in turn, the United States (by the fifth article of the Treaty of 1835) had authorized the

Cherokees to make laws for the government and protection of their persons and property.

But about twenty years ago Congress adopted the policy of abolishing the Cherokee Government and its national existence, and continued that work down to the culminating act of July 1, 1902, referred to herein as the Cherokee Allotment Act, after which there remained merely the shell of the former government, which has been likened in its condition to an insolvent corporation.

The provisions of the Cherokee constitution relating to the election of the National Committee and Council and of Principal Chief are as follows:

> "SEC. 3. The National Committee shall consist of two members from each district, and the Council shall consist of three members from each district, to be chosen by the qualified electors in their respective districts for two years; the elections to be held in the respective districts every two years, at such times and places as may be directed by law.
>
> (Constitution Cherokee Nation, Article III.)

> "SEC. 1. The Principal Chief shall hold his office for the term of four years, and shall be elected by the qualified electors, on the same day, and at the places where they shall respectively vote for members to the National Council."
>
> (Constitution Cherokee Nation, Article IV.)

The following reference to acts of Congress, beginning in 1889, will show the stages by which the Cherokee Government was gradually diminished and ultimately destroyed.

By the act of March 1, 1889 (25 Stat., 783), a United States court was established in the Indian Territory with exclusive jurisdiction over all offenses against the laws of the United States committed within the Indian Territory not punishable by death or imprisonment at hard labor; also civil jurisdiction over controversies among citizens of the United States, and between a citizen of the United States and any other person residing or found in the Indian Territory.

By act of May 2, 1890 (26 Stat., 81), the jurisdiction of this court was further defined and more than forty chapters of Mansfield's Digest of the Laws of Arkansas, where made of force in the Indian Territory; and the Constitution of the United States and all general laws of the United States prohibiting crimes and misdemeanors in any territory within the exclusive jurisdiction of the United States, and all laws relating to banking associations, where made of force in the Indian Territory; and jurisdiction, civil and criminal, was conferred on the United States courts over controversies between members of different tribes in the Indian Territory.

By the act of March 3, 1893 (27 Stat., 645, sec. 16), the Commission to the Five Civilized Tribes, commonly called the Dawes Commission, was created expressly "for the purpose of the extinguishment of the national or tribal title" to the lands of the Five Civilized Tribes, either by cession to the United States or by allotment and division of the same in severalty among the Indians.

The declared purpose of so extinguishing the tribal title has never at any time been abandoned, but, on the other hand, has been constantly maintained as is shown by reference to the subsequent acts continuing and extending the work of this Commission among the Five Civilized Tribes, to wit: 28 Stat., 939; 29 Stat., 321; 30 Stat., 939; 31 Stat., 236, 1073; 32 Stat., 258.

By the act of June 10, 1896 (29 Stat., 339), the power of determining the right of Cherokees to enrollment as members of the tribe, which had formerly been vested exclusively in the Cherokee National Council, was given to the Dawes Commission, and this Commission was made the tribunal for passing upon all applications for admission, with the right of appeal to the United States Court in the Indian Territory.

By the act of June 7, 1897 (30 Stat., at p. 83), it is provided:

"That on and after January 1, 1898, the United States courts in said Territory shall have original and exclusive jurisdiction and authority to try and determine all civil causes in law and equity thereafter instituted, and all criminal causes for the punishment of any offense committed after January 1, 1898, by any person in said Territory, and the United States Commissioners in said Territory shall have and exercise the power and jurisdiction already conferred upon them by existing laws of the United States as respects all persons and property in said Territory; and the laws of the United States and the State of Arkansas in force in the Territory shall apply to all persons therein, irrespective of race, said courts exercising jurisdiction thereover as now conferred upon them in the trial of like causes."

It is also further provided in the said act (p. 84):

"That on and after January 1, 1898, all acts, ordinances and resolutions of the council of either of the aforesaid five tribes passed, shall be certified immediately upon their passage to the President of the United States and shall not take effect if disapproved by him, or until thirty days after their passage: *Provided,* That this act shall not apply to resolutions for adjournment, or any acts, or resolutions, or ordinances in relation to negotiations with Commissioners heretofore appointed to treat with said tribes."

By the act of June 28, 1898 (30 Stat., 495), entitled "an act for the protection of the people of the Indian Territory, and for other purposes," and commonly known as the Curtis Act, it is provided:

"SEC. 13. That the Secretary of the Interior is hereby authorized and directed from time to time to provide rules and regulations in regard to the leasing of oil, coal, asphalt, and other minerals in said Territory, and all such leases shall be made by the Secretary of the Interior; and any lease for any such minerals otherwise made shall be absolutely void. No lease shall be made or renewed for a longer period

than fifteen years, nor cover the mineral in more than six hundred and forty acres of land, which shall conform as nearly as possible to the surveys" (pp. 498, 499).

"SEC. 16. That it shall be unlawful for any person, after the passage of this act, except as hereinafter provided, to claim, demand, or receive, for his own use or for the use of any one else, any royalty on oil, coal, asphalt, or other mineral, or on any timber or lumber, or any other kind of property whatsoever, or any rents on any lands or property belonging to any one of said tribes or nations in said Territory, or for any one to pay to any individual any such royalty or rents or any consideration therefor whatsoever; and all royalties and rents hereafter payable to the tribe shall be paid, under such rules and regulations as may be prescribed by the Secretary of the Interior, into the Treasury of the United States to the credit of the tribe to which they belong" (p. 501).

"SEC. 19. That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation" (p. 502).

"SEC. 26. That on and after the passage of this act the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory" (p. 504).

"SEC. 28. That on the first day of July, eighteen hundred and ninety-eight, all tribal courts in Indian Territory shall be abolished, and no officer of said courts shall thereafter have any authority whatever to do or perform any act theretofore authorized by any law in connection with said courts, or to receive any pay for same; and all civil and criminal causes then pending in any such court shall be transferred

to the United States court in said Territory by filing with the clerk of the court the original papers in the suit; *Provided,* That this section shall not be in force as to the Chickasaw, Choctaw and Creek tribes or nations until the first day of October, eighteen hundred and ninety-eight" (pp. 504, 505).

By the act of July 1, 1898 (30 Stat., 571, p. 591), the right of appeal to the Supreme Court of the United States from the United States courts in the Indian Territory was granted in all citizenship cases.

By the act of March 31, 1900 (31 Stat., 236), the Commission to the Five Civilized Tribes was continued and certain enactments made with reference to their action in citizenship cases.

By the act of March 3, 1901, the Commission to the Five Civilized Tribes was authorized and directed to fix a time by agreement with either of the Five Civilized Tribes for closing the rolls, and provided that no ordinance or resolution of the Creek or Cherokee Tribes, except resolutions for adjournment, should be of any validity until approved by the President of the United States (31 Stat. L., 1077).

By another act approved March 3, 1901 (31 Stat., 1447), all citizens in the Indian Territory were made citizens of the United States.

By Act of July 1, 1902, it is provided:

"SEC. 63. The tribal government of the Cherokee Nation shall not continue longer than March fourth, nineteen hundred and six.

"SEC. 64. The collection of all revenues of whatsoever character belonging to the tribe shall be made by an officer appointed by the Secretary of the Interior, under rules and regulations to be prescribed by the said Secretary.

"SEC. 66. All funds of the tribe, and all moneys accruing under the provisions of this act, shall be paid out under the direction of the Secretary of the Interior, and when required for per capita payments shall be paid directly to each individual by an ap-

pointed officer of the United States, under the direction of the Secretary of the Interior.

"SEC. 67. The Secretary of the Interior shall cause to be paid all just indebtedness of said tribe existing at the date of the ratification of this act which may have lawfully been contracted, and warrants therefor regularly issued upon the several funds of the tribe, as also warrants drawn by authority of law hereafter and prior to the dissolution of the tribal government, such payments to be made from any funds in the United States Treasury belonging to said tribe, and all such indebtedness of the tribe shall be paid in full before any pro rata distribution of the funds of the tribe shall be made. The Secretary of the Interior shall make such payments at the earliest time practicable and he shall make all needed rules and regulations to carry this provision into effect.

"SEC. 73. The provisions of section thirteen of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled "An act for the protection of the people of the Indian Territory, and for other purposes," shall not apply to or in any manner affect the lands or other property of said tribe, and no act of Congress or treaty provision inconsistent with this agreement shall be in force in said Nation except sections fourteen and twenty-seven of said last-mentioned act, which shall continue in force as if this agreement had not been made."

Having failed in the expectation that the whole property of the Cherokee Nation would be finally distributed by that date, Congress on March 2, 1906 (34 Stat., 822), by a joint resolution declared:

"The tribal existence and present tribal governments of the Choctaw * * * Cherokee * * * Tribes or Nations of Indians in the Indian Territory are hereby continued in full force and effect for all purposes under existing laws until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members of said tribes, unless hereafter otherwise provided by law."

Afterwards, by section 28 of the act of April 26, 1906 (34 Stat., 148), it was enacted that:

> "The tribal existence and present tribal governments of the Choctaw * * * Cherokee * * * Tribes or Nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, etc."

From the foregoing statutory enactments it is clear that the Cherokee tribal government had been abolished. The National Treasury had been destroyed, the Cherokee courts, judiciary and law, had been done away with, the power of the National Council to enact laws had been taken away, the terms of office of the Principal Chief and of the members of the National Council had expired, and there was no law under which an election could be held; so that there were no laws, no legislature, no courts, no treasury, no tribal officers, and no tribal government.

Under the act of July 1, 1902, certain clerical work connected with the allotment of lands, the sale of town lots, the continuing of the Cherokee schools, &c., was assigned to the quondam Principal Chief and to the so-called National Council, but such duties were ministerial and subject to the Secretary of the Interior, and the language of section 63 of the act wherein the term "tribal government" and "Cherokee Nation" are used, must be read in the light of the foregoing facts, and of the further purpose to defeat any claim of the Missouri, Kansas & Texas Railroad, as will appear hereafter in the argument of the case.

II.

FULL AND UNQUALIFIED CITIZENSHIP.

By the act of March 3, 1901 (31 Stat. L., 1447), every Indian in the Indian Territory is declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens, without in any manner impairing or otherwise affecting his right to tribal or other property.

Congress by the act of May 2, 1890 (26 Stat., 96), extended the Constitution of the United States over the Indian Territory. The 14th Amendment declares: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

By these laws the Cherokees were emancipated from any other control of Congress than that exercised over all citizens.

It is to be observed that under the allotment act of July 1, 1902, no different conditions are attached to the allotted and inherited lands of full-blood Cherokees from those of the mixed-bloods, while the act of April 26, 1906, distinguishes between full-blood and mixed-blood Cherokees and seeks to affect only the former. Since both the full-bloods and the mixed-bloods are citizens of the United States, with equal rights in their Cherokee lands, it is impossible for Congress to enact any valid law treating the one class of persons in a different manner from that adopted toward another class, with regard to the right to own, use and dispose of the same.

That the United States cannot make distinctions of any kind between its citizens on account of race or color is so plain that authority is hardly necessary.

We show, however, that it has been adjudged that an Indian citizen of the United States has the same responsibility, and therefore necessarily the same rights, as a white man.

In the case of Felix *vs.* Patrick, 145 U. S., 317, 331, where the duties and responsibilities of Indians are discussed it is said:

> "It is practically admitted in this case that, in 1887, when their relations with their tribe were severed by accepting allotments of land in severalty under the treaty of April 29, 1878, they became citizens of the United States; that they were then chargeable with the same diligence as white people in the discovery of this fraud; and, as their bill was filed in 1888, it is claimed that they fulfilled all the requirements of law in this particular."

In the case of Heff, 197 U. S., 488, where the defendant had been indicted for selling liquor to an Indian under a statute forbidding such sales to any Indians to whom allotment of land had been made, the court declared—

> (1) That the allottee under the act becomes a citizen of the United States immediately upon his allotment, without waiting for the expiration of the twenty-five year period in which his land is to be held in trust;
>
> (2) That the conferring of citizenship upon an Indian emancipates him from the guardionship of the United States, which cannot be afterwards resumed by Congress without the consent of the Indian and the State wherein he resides;
>
> (3) That this emancipation is not affected by the fact that the act conferring citizenship upon the Indian also allots him land subject to conditions against alienation and encumbrance for a specified time;
>
> (4) That the act under which conviction was had, was unconstitutional, being a mere police regulation affecting Indian citizens of the United States, over whom Congress has no more power that it has over any other class or race of citizens.

Certainly this opinion clearly determines that whatever right of control the United States may have had at any time over the Cherokee Indians, it has passed out of the United States by the grant of full and complete rights of citizenship, and that, as citizens, the allotted Cherokee Indians may avail themselves of every privilege granted under the laws and the Constitution to every other citizen of the United States—white, black, yellow, or red.

In the case of Viles, 139 Fed. Rep., 68, 70, the court said:

> "I understand the decision of the Supreme Court in the Heff case as a broad declaration of a fundamental principle * * * that when an individual has once acquired the rights and privileges of a citizen, and becomes subject to State laws, his status cannot be changed by an act of Congress without his individual consent and the concurrent assent of the State in which he resides."

The dissenting justice in the case at bar says:

> "In Garfield *vs.* United States *ex rel.* Goldsby, 211 U. S., 249, the court said that 'it has always been recognized that one who has acquired rights by an administrative or judicial proceeding can not be deprived of them without notice and an opportunity to be heard'—thus defining the meaning and extent of constitutional practice against action without due process of law" (Rec., 48).

In support of its second conclusion of law, holding that the enrolled Cherokees were not emancipated from the control of Congress by the act of March 3, 1901, the Court of Claims declares:

> "But independent of the findings the court will take judicial notice of the Indians as wards of the Nation, and their consequent dependence upon the Government as their guardian" (Rec., 38, bottom of page).

This doctrine would be applicable in this case if these Cherokees were, in fact, "wards." Instead of being "wards," each one of them is a full-fledged citizen of the United States; the Government is not their guardian, but their servant. When an Indian is created a citizen of the United States, and the Constitution is put in force over him and his country, he necessarily ceases to be a "ward," and the Government can no longer be his "guardian."

In U. S. *vs.* Boyd *et al.*, 68 Fed. Rep., 577, which involved the relation of the Eastern Band of Cherokees to the United States, the court said:

> "At the threshold of this case the question is raised as to the jurisdiction of this court, and that question depends upon the relation which the United States bears to these Cherokee Indians. Are they under the guardianship of the United States as tribal Indians are, or are they citizens of the United States, with all the rights, powers, duties and obligations of such citizens? The decision of this question is necessary before discussing any other questions in the cause."

Thus the court draws sharply the contrast between a citizen of the United States and a tribal Indian under guardianship, and makes that the absolute test of its jurisdiction.

The court concluded in that case that citizenship in the United States had not been conferred upon the Cherokee Indians at that time, that they had not been otherwise discharged from Federal guardianship, and inasmuch as the property in dispute was *clearly tribal property,* the court had jurisdiction.

In the act of March 3, 1871, now section 2103, Rev. Stat., regulating Indian contracts, Congress confined its action to contracts "with any tribe of Indians, or individual Indians *not citizens of the United States,*" thereby clearly and fully recognizing that the individual Indian who is a citizen of the United States cannot be subjected

to the control of Congress in the exercise of his individual rights.

The same principle was recognized by Congress in the act of May 8, 1906 (34 Stat., 182), amending section 6 of the general allotment act of February 8, 1887 (24 Stat., 388). By the general allotment act, as originally passed, every Indian became a citizen of the United States upon the completion of his allotment and the patenting of the lands to him. By amendment of May 8, 1906, he does not become a citizen until after the expiration of the trust period of twenty-five years.

If the grant of citizenship affords no protection against control by Congress, and if the citizen Indian and his property are subject to the dominion of Congress to the same extent as one who is not a citizen, why did Congress pass this amendment and thus defer the grant of citizenship for twenty-five years?

In the case at bar the Cherokees have unquestionably been made citizens of the United States and discharged from Federal guardianship, and the property involved is so far from being tribal property, that it is in law and fact individual property held in severalty, independently, and even adversely to the tribe, if any such tribe exist.

It was allotted to these individual owners through the agency of the Dawes Commission, which was created by Congress expressly "for the purpose of the extinguishment of the national or tribal title" to these lands.

The Court of Claims declares that the acts of 1904 and 1906 are analogous to the protection afforded by the States to the property of infants and others incompetent, from any cause, to manage their own affairs, though they be citizens of the United States (R., 40). The analogy does not exist. The complaint in this case is the absence of just such judicial machinery, due process of law, as is afforded by the States.

It is worthy of note that the Court of Claims quotes from Lone Wolf *vs.* Hitchcock (187 U. S., 553, at 565) (R., 35)

the exact language previously quoted by the Supreme Court in the case of Heff (197 U. S., 488, at 498), and that the Supreme Court reached the conclusion in the Heff case that the Indian had been emancipated by the grant of United States citizenship and was no longer the ward of the Government, and that the Government was powerless to control the sale of intoxicating liquors to him. The Court of Claims, on the other hand, quoting exactly the same language, reaches precisely the opposite conclusion; and, notwithstanding the decision of this court in the Heff case, held that the grant of United States citizenship did not emancipate the Indians of the Five Civilized Tribes, that they are still wards of the Government, that the Government is still their guardian and that Congress has such absolute control of them and their property that the court is powerless to furnish them any protection whatever.

A distinction was attempted to be made between the Heff case and the case at bar, because the former related to political and civil rights, while the latter related to property. It is true that property rights are involved in this case, but so are the civil and political rights of these Indian citizens; and surely if Congress was without authority to protect the Indian against the use of liquor, as was decided in the Heff case, because he had been made a citizen of the United States, this court cannot find that the protection of the civil and political right of a citizen to manage and control his own property is less sacred than his right to destroy himself with intoxicating liquors. In the Heff case the citizenship in question was acquired under the act of February 8, 1887 (24 Stat., 388), and that of the Cherokees in this case under the act of March 3, 1901 (31 Stat., 1447), amending the former act by making it applicable to "every Indian in the Indian Territory." In these two cases the "citizenship" is identically the same and the conclusions are diametrically opposite.

In the Heff case (197 U. S., 488, at 499) the court declared that of late years a new policy had been entered upon by

Congress which looks to the breaking up of tribal relations, the establishing of separate Indians in individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States. That is exactly the policy adopted toward the Indians of the Five Civilized Tribes, and this court held in the Heff case that when Congress had once terminated the guardianship over the Indian and established him as an American citizen, it was too late to retrace its steps and restore him again to the guardianship from which he had been released.

In the early Civil Rights Cases, *109 U. S.*, p. 25, the court says:

> "There must be a time when a former slave takes the rank of a *mere* citizen, ceases to be the *special favorite* of the law, and when his rights as a *citizen* are to be determined by the ordinary modes by which other men's rights are protected."

The same thing must be true of the civilized Indians.

Has that time come?

The Constitution of the United States has been expressly made applicable to the country where he resides; he has been made a citizen of the United States; his own government has been stripped of *all power* and he is made subject to the laws of the United States.

Surely the time is already here when he must be judged by the same rules as other citizens.

III.

CHEROKEE ALLOTMENT ACT OF JULY 1, 1902.

The act of July 1, 1902, commonly known as the Cherokee Agreement, and so designated in section 73 thereof, was a proposition submitted by Congress to the Cherokees, accepted and ratified by them, and adopted by both parties for the purposes of allotting and distributing all the Cherokee lands and funds to those members of the tribe enrolled in accordance with the terms of the act and living on September 1, 1902. Under this act appellants became vested with fee simple titles to their lands.

This act supersedes the Constitution and laws of the Cherokee Nation, and all treaties and laws of Congress regarding the ownership of Cherokee lands, destroys the communal title thereof and provides for a partition of the same among the former communal owners.

All right, title and interest of the Cherokee owners, called the Cherokee Nation, and of every citizen thereof, in each particular allotment is conveyed to the allottee by the patent issued to him.

The question arises, What right, title and interest had the Cherokee Nation (so called) and the citizens thereof in these lands so conveyed by patent to an allottee?

The question is thus answered. Article II of the treaty of May 6, 1828 (7 Stat. L., 311), declares that:

> "The United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee is hereby solemnly pledged, of seven million acres of land, to be bounded as follows:" etc.

Article I of the treaty of February 14, 1833 (7 Stat. L., 415), provides that:

> "The United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee, is hereby pledged, of seven million acres of land to be bounded as follows:" etc.

By the treaty of December 29, 1835 (7 Stat. L., 478-480), the Cherokees relinquish to the United States all their lands east of the Mississippi River, and Article II provides:

> "Whereas by the treaty of May 6, 1828, and the supplementary treaty thereto of February 14, 1833, with the Cherokees west of the Mississippi the United States guaranteed and secured to be conveyed by patent, to the Cherokee Nation of Indians the following tract of country." * * * (describing the same land.)

The treaty further provides that in consideration of the sum of five hundred thousand dollars the United States "hereby covenant and agree to convey to the said Indians and their descendants by patent, in fee simple" an additional tract of land.

Article III of said treaty declares:

> "The United States also agree that the lands above ceded by the treaty of February 14, 1833, including the outlet, and those ceded by this treaty shall all be included in one patent executed to Cherokee Nation of Indians by the President of the United States according to the provisions of the act of May 28, 1830."

The act of May 28, 1830, referred to in this article, provides in section 3 as follows:

> "That in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made that the United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them;

and if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same" (4 Stat., 411, 412).

In accordance with the provisions of the foregoing treaties and laws, the United States, on December 31, 1838, issued a patent to the Cherokee Nation for the lands described in said treaties, which, after reciting the provisions of the said several treaties relating to said lands, provided as follows:

> "Therefore, in execution of the agreements and stipulations contained in the said several treaties, the United States have given and granted, and by these presents do give and grant, unto the said Cherokee Nation, the two tracts of land so surveyed and hereinbefore described, containing in the whole fourteen million three hundred and seventy-four thousand one hundred and thirty-five and 14/100 acres (14,374,135.14);
>
> "To have and to hold the same, together with all the rights, privileges, and appurtenances thereto belonging, to the said Cherokee Nation forever; subject, however, to the right of the United States to permit other tribes of Red Men to get salt on the salt plain and on the western prairie referred to in the second article of the treaty of the 29th of December, one thousand eight hundred and thirty-five, which salt plain has been ascertained to be within the limits prescribed for the outlet agreed to be granted by the said article; and subject also to all the other rights reserved to the United States, in and by the articles hereinbefore recited, to the extent and in the manner in which the said rights are so reserved; and subject also to the condition provided by the act of Congress of the twenty-eighth of May, one thousand eight hundred and thirty, referred to in the above-recited third article, and which condition is that the lands hereby granted shall revert to the United States if the said Cherokee Nation becomes extinct or abandons the same."

Article I of the treaty of August 6, 1846 (9 Stat., 871), provides:

"That the lands now occupied by the Cherokee Nation shall be secured to the whole Cherokee people for their common use and benefit; and a patent shall be issued for the same. * * *"

This patent was never issued.

Regarding the character of the grant contained in the patent of 1838, it has been said:

"This Indian title being a base, qualified, or determinable fee, with only the possibility of reversion, and not the right of reversion, in the United States, all the estate is in the Cherokee Nation of Indians."

U. S. *vs.* Reese, 5 Dill., 405, 412.
In re Wolf, 27 Fed. Rep., 606, 607, 615.
Cherokee Nation *vs.* Southern Kans. R. R. Co., 33 Fed. Rep., 900-905.

The Cherokee title rests upon the grant contained in the treaty of 1828 and not upon the patent.

Holden *vs.* Joy, 17 Wall., 211.

By the Constitution of the Cherokee Nation, it was provided in Article I, section 2, that "the lands of the Cherokee Nation shall remain common property," and by the first amendment to Article I of said Constitution, in section 2 thereof, it was provided that "the lands of the Cherokee Nation shall remain common property until the National Council shall request the survey and allotment of the same in accordance with the provisions of Article XX of the treaty of the 19th day of July, 1866, between the United States and the Cherokee Nation."

"ART. XX. Whenever the Cherokee National Council shall request it, the Secretary of the Interior shall cause the country reserved for the Cherokees to be surveyed and allotted among them at the expense of the United States."

By act of the Cherokee Council at its session of 1901, a formal request for the division and allotment of said lands was made (H. R. Doc. No. 552, 57th Cong., 1st Sess.), and in pursuance of said request the Allotment Act of July 1, 1902, was passed by the Congress and ratified by the Cherokee people.

With this request of the Cherokee Council, the lands of the Cherokees became subject to allotment among the Cherokee people.

It will be noted that by section 58 of the Cherokee Allotment Act of July 1, 1902, the Secretary of the Interior is to furnish the Principal Chief of the tribe with blank patents to be executed by the chief and delivered to the allottee. This deed is executed for and on behalf of the Cherokee people, or nation so-called, in whom the whole title was vested.

Section 59 of said act provides that each of these conveyances shall be approved by the Secretary of the Interior, which shall serve as a *relinquishment* to the grantee of all the right, title and interest of the United States in his allotment.

There was no title then in the United States to these lands as a matter of fact, in view of the decision in Holden *vs.* Joy, *supra,* but this provision was inserted doubtless to remove any question that might otherwise have arisen under the patent of 1838.

IV.

THE ACTS OF MARCH 11, 1904, AND APRIL 26, 1906.

These two acts in the respects complained of constitute a taking of private property without due process of law.

The lexicographer says that property is "the exclusive right of possessing, enjoying, and disposing of a thing;" and he is, perhaps, as accurate in this definition as the courts have been.

It is said that—

> "Property, in its broadest and most comprehensive sense, includes all rights and interests in real and personal property, and also any easements, franchises and incorporeal hereditaments" (Met. City Ry. Co. *vs.* Chicago R. R. Co., 87 Ill., 317).

> "Property in its appropriate sense means that dominion and indefinite right of user and disposition which one may lawfully exercise over particular things and objects, and generally made to the exclusion of all others" (Rigney *vs.* Chicago, 102 Ill., 64; Dorman *vs.* State, 34 Alabama, 239).
>
> "The word is *nomen generalissimum* and extends to every species of value in interest, including real and personal property, easements, franchises and other incorporeal hereditaments" (Boston Ry. Co. *vs.* Salem Ry. Co., 2d Gray, 35; People *vs.* Mayor of Brooklyn, 9 Barb., 535; Springfield Insurance Co. *vs.* Allen, 43 N. Y., 389; Williston Seminary *vs.* Hampshire Co., 147 Mass., 427).
>
> "The mere possession of real estate is constantly treated as property" (King *vs.* Goertz, 70 Cal., 240).

We come now to consider the act of March 11, 1904, which act undertakes to empower the Secretary of the Interior to grant rights of way for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through any lands which have been allotted in severalty to Cherokee citizens without regard to the quantum of Indian blood.

By this act Congress has assumed to empower the Secretary to dispose of private property belonging to Cherokee allottees for private use, and to exercise the right of eminent domain, and to fix and determine the value of the easements thereunder acquired, and to give him power to grant such rights for a period of twenty years, and at the end of this period to renew the easement for another twenty years.

It is to be noted that the granting of such rights of way is possible only under the sovereign's right of eminent domain. This right can be enforced by the Government in the first place only for public corporations. There is no law under which the rights of one individual may be taken from him and conferred upon another individual. In other words, private property can never be taken except for public use; and then only upon the payment of just compensation, which is a question for judicial determination.

Even if the granting of rights of way by the Secretary were limited to public corporations, the right of the citizen to have such power exercised by the tribunal provided by law—in other words, by due process of law—is, by this act, utterly destroyed. This is true also if the Secretary may fix a compensation, for the allottee has the right also to have the question of compensation likewise determined.

It is evident that this act, putting into the hands of the Secretary the exercise of the right of eminent domain, and giving him the power to take rights from one individual and to bestow them upon another, and authorizing him to determine the compensation, proceeds upon the theory that, the allottees being Indians, they continue to be under the

control and supervision of the Secretary of the Interior and are not protected by the Constitution, which has, by act of Congress, been extended over their country.

Under this act the Secretary has granted rights of way to a number of corporations through the private property of a large number of Cherokee citizens (Rec., 24), and he has determined for himself the amount of damages to be paid for such rights of way.

So long as the Cherokees were wards of the Nation and were not citizens of the United States, and while their property was held in common, such contracts might have been made as to tribal lands by the Secretary of the Interior under the authority of an act of Congress; but when Congress conferred citizenship upon the Cherokee Indians, there is not the slightest doubt that they became instantly entitled to have their property rights protected by the judicial tribunals of the country in the same manner as other citizens; and, unless this court is ready to hold that the citizens of the United States are not equal in their rights and privileges—that citizenship means one thing to one man and another thing to another, and that it means different things to different men because they are of different color or different races—it must declare this act of March 11, 1904, to be, in the particulars mentioned, in violation of both constitutional provisions—that private property shall not be taken for public use without adequate compensation, and that the exercise of such power as is provided for the Secretary of the Interior accomplishes a taking of the property of allottees without due process of law.

To place restrictions upon the lands owned by the Cherokee Indians, citizens of the United States, as is attempted by the act of April 26, 1906, is a deprivation of property within the meaning of that term as used in the Fifth Amendment to the Constitution.

> "The constitutional guaranty, that no person shall be deprived of his property without due process of

law, may be violated without the physical taking of property for public or private use. Property may be destroyed or its value may be annihilated; it is owned and kept for some useful purpose, and it has no value unless it can be used. Its capacity for the enjoyment, and adaptability to some use are essential characteristics and attributes without which property cannot be complete, and hence any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property."

In the matter of Jacobs, 98 N. Y., 99-105.

"Depriving an owner of property of one of its essential attributes is depriving him of his property within the constitutional provision."

People *vs.* Otis, 90 N. Y., 48, 52.

"The third absolute right inherent in every Englishman is that of property, which consists in the free use, enjoyment, and disposal of all his acquisitions without any control or diminution save only by the law of the land."

1 Blackstone's Commentaries. 138.

"There may be such serious interruption to the common and necessary use of property as will be equivalent to a taking within the meaning of the Constitution."

Pumpelly *vs.* Greenbay Co., 13 Wall., 167, 177.

U. S. *vs.* Alexander, 148 U. S., 187.

Montana Co. *vs.* St. Louis Min. Co., 152 U. S., 169.

Central Trust Co. *vs.* Hennen, 90 Fed. Rep., 597.

George Bird, a member of the Puyallup tribe, was allotted certain lands in accordance with the 6th article of the treaty with his said tribe, which treaty provided for such allotment and conveyance upon certain conditions and with certain restrictions as to alienation, subject to which the allotted lands were to belong to the allottees and to be in-

heritable by their heirs. Under the provisions of the treaty, allottees were permitted to lease their allotted lands for terms not exceeding two years. Bird was given possession of his allotment in January, 1881. Subsequent to the occupation of his allotment by Bird, the Secretary of the Interior made certain rules and regulations respecting the leasing of Indian lands, providing that such leases could not be made unless submitted to and approved by the Secretary of the Interior, and that all the rental money should be paid to the Indian agent for the allottees. Bird had made a lease of his land without the approval of the Secretary of the Interior. It was held by the United States Circuit Court for the Western District of Washington that a patent to an Indian under such treaty, which recited the terms of the grant, conveyed to him a vested estate which could not be taken away or affected by any subsequent action of the Executive Department, so long as the allottee complied with the conditions; and that Bird had become a citizen of the United States and was entitled to all the rights of other citizens; that he might prosecute and defend any suit in respect to his property rights, and that his ownership and use of land which had been patented to him under a treaty were matters not subject to the decision or control of either Congress or the Executive branch of the Government. Upon this latter point the court said:

> "He is a citizen of the United States and entitled, equally with other citizens, to make a lawful use of his own property, and to prosecute and defend in the courts of this State, and in the courts of the United States, actions affecting his legal rights with respect to property, and to make contracts, not prohibited by law, including leases of the land in question for terms not exceeding two years. Having a complete vested estate in the land, and being endowed with the rights of citizenship, George Bird is under the protection of the guaranties of the Constitution of the United States, so that neither Congress nor the Executive branch of the Government can divest him of his property, nor deny to him the

> equal protection of the laws in a manner which would violate the constitutional rights of any other citizen * * * nor (can he) be subjected to the control of Government functionaries in the matter of leasing his lands for a term not exceeding the time limit specified in his patent."
>
> Bird *vs.* Terry, 129 Fed. Rep., 472, 477.

The opinion in this case combines the legal principles applicable to the title of an Indian allottee as laid down by this court in the case of the Kansas Indians, 5 Wall., 737, and that of Jones *vs.* Meehan, 175 U. S., 1.

What constitutes the taking of property without due process is admirably stated in the opinion of the dissenting justice in the case at bar as follows:

> "Any interference which destroys the market value of an owner's individual property is the equivalent of a taking.
>
> "The inheritances provided for in the allotment act of July 1, 1902, had taken effect and fixed rights not only for those authorized to inherit, but also accomplished results for those intervening as purchasers or lessees within the limitations of the act which gave the allotments. The efforts of the Government now to control the land beyond the terms first fixed constitute the imposition of such penalties upon the present allottees in the use of their property as practically to convert the fee derived by them under the terms of the grant into a life estate—with limitations upon the use so serious in character as to even lessen the value of the life estate itself. These efforts attempt to surrender to the law-making power the right of continued interference not only as such interposition may affect the living generation but future generations of Indians as well in the control and enjoyment of private property held by as good a title as can be conferred by law.
>
> " 'Some things lie too deep in the common sense and common honesty of mankind to require argument or authority to support them.' So said the Supreme Court. Fixed rules which obtain everywhere for the protection of private property are in

this class and apply to Indians in possession under a lawful grant as much as to others holding by a patent from the Government, regardless of citizenship."

V.

What Constitutes Due Process of Law?

There is no single, comprehensive definition of the term. It is said that due process of law means such an exercise of the power of government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs (Cooley's Constitutional Limitations, sec. 356).

In the Dartmouth College case, Mr. Webster said:

> "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry and renders judgment after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass in the form of an enactment is not, therefore, to be considered in the law of the land" (*ibid.*, 252, 253).

Citing a number of authorities, Cooley says:

> "The words 'by the law of the land,' as used in the Constitution, do not mean a statute for the purpose of working the wrong. That construction would render the restriction absolutely nugatory and turn this part of the Constitution into mere nonsense. The people would be made to say to the two houses: 'You shall be vested with the legislative power of the State, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen unless you pass a statute for that purpose. In other words, you shall not do wrong unless you choose to do it'" (*ibid.*, 353).

It is otherwise defined as—

> "A prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt and determining the title to property" (Taylor *vs.* Porter, 4 Hill., 140-1; Dartmouth College *vs.* Woodward, 4th Wheaton, 518, 581).

Again, it is said that it is—

> "An orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce and protect his rights" (State *vs.* Billings, 57 N. W. Rep., 206; Stewart *vs.* Palmer, 74 N. Y., 183-191).
>
> "It is synonymous with 'the law of the land'" (Murray *vs.* Land Co., 18 Howard, 272; Green *vs.* Briggs, 1 Curtiss, 311).

And again:

> "The constitutional provision that no person shall be deprived of life, liberty, or property without due process of law extends to every governmental proceeding which may interfere with personal or property rights, whether the legislation be legislative, judicial or executive, and relating to that class of rights the protection of which is peculiarly within the judicial branch of the government" (Holden *vs.* Harding, 169 U. S., 366; Chicago Ry. Co. *vs.* Minn., 134 U. S., 418; Hagar *vs.* Reclamation District, 111 U. S., 701).
>
> "The same doctrine is laid down in numerous cases, decided by the Supreme Court of various States, arising under the 14th Amendment to the Constitution, and all holding that an enactment of the legislature is not enough of itself to constitute due process of law" (Atlanta *vs.* Central Ry. Co., 53 Ga., 120; Cook *vs.* Commission, 61 Ill., 115; Stewart *vs.* Balto., 7 Ind., 500; Embury *vs.* Connor, 3 N. Y., 511).

The defendants before the Court of Claims laid great stress on the fact that the act of 1906, in question here, was passed and approved *before* the expiration of the five-year limit

fixed in the act of July 1, 1902, against alienation. They seem to think that a condition imposed on the title under the latter act operated to give the United States a right of control of the allotted lands within the period of inalienability. As a matter of law, however, the imposition of these restrictions upon alienation under the act of 1902 vested no interest whatever in the United States, in reversion or otherwise, and did not serve to give the United States any right or control over said lands beyond the period fixed by the act of 1902.

A violation of the condition prohibiting alienation within the time fixed would not in this or any other case redound to the benefit of the United States.

In Schrimpscher *vs.* Stockton, 183 U. S., 290, 299, the court said:

> "Here the United States had issued a patent to Rodgers 'and to his heirs and assigns forever,' subject to a condition, not that the title should revert to the United States, but that he should not alienate the lands without the consent of the Secretary of the Interior. The Government thus passed all its title to the land in fee simple, and a violation of the condition of the patent would not redound to the benefit of the United States or enable it to repossess the lands, but was simply intended to protect the grantee himself against his own improvident acts, and to declare that the title should remain in him, notwithstanding any alienation that he might make."

In Libby *vs.* Clark, 118 U. S., 250, 255, the court said:

> "The title conveyed to Hurr by the patent was a fee simple; that is, it was all the title or interest in the land. No one shared this title, or had any interest in it, and it descended, or would have descended, to his heirs. The restriction on his right to convey did not deprive the title of the character of a fee simple estate. 'An estate in fee simple is where a man has an estate in lands or tenements to him and his heirs forever' (4 Com. Dig., Estates, 1).

> The limitation on the power of the sale for five years is not inconsistent with a fee simple estate."

The Court of Claims, in support of its decision, declares that if a citizen is:

> "Not competent and *sui juris* to act for himself, the Government, through its proper channel, may act for him to the end that he be protected in his rights of person and property" (R., 35, near bottom).

What does the court mean by the "proper channel?" In this case these words would seem necessarily to refer to the legislative branch of the Government. The court, therefore, would hold that if the legislative branch, at any time, concludes that a citizen of the United States is not competent to act in and about the management of his personal affairs and his private property with the wisdom and prudence that the members of the Legislature deem proper, it is entirely competent for the latter, without judicial inquiry of any kind, to deprive such citizen of the ordinary use and control of his property.

The appellants deny that Congress can designate a particular person of full age, having all the rights and privileges of an American citizen, and lay restrictions upon him and on the use of his property, held by him in fee simple and in his individual right, under the pretense that the legislature is affording him protection. If the Government can do this with the red man why not with the black, and if with the black why not with the white?

If the legislature of one of the States, in which a large number of uneducated colored people reside, should conceive the notion that they were not managing their affairs in the wisest and best way practicable, and for their protection should pass an act laying restrictions upon the sale of their real estate for a period of twenty-five years, would this court hold that it was competent legislation?

Article 14 of the Constitution specifically denies authority to any State to deprive any person of life, liberty, or property without due process of law. In exactly the same manner the 5th Amendment to the Constitution declares, "nor shall any person * * * be deprived of life, liberty, or property without due process of law." This furnishes exactly the same protection against legislation of this character enacted by Congress that the 14th Amendment furnishes against similar legislation enacted by any State legislature.

By sections 38 *et seq.* of the Cherokee Allotment Act of July 1, 1902 (32 Stat., 716, 722), it was provided that certain town sites should be surveyed and the lots sold. Under the statute "any person" could become a purchaser. The full-blood Indians, as citizens of the United States, had a perfect right to, and, no doubt, in numerous instances did, purchase town site property, and took a fee-simple title thereto. Has Congress now the power to pass an act converting the fee-simple title of these full-blood Indians into a life estate? Has it power to restrict in any way the fee-simple title to these lots? If it cannot do this, upon what theory can it convert the fee-simple title to lands taken in allotment into what is practically a life estate?

We confidently assert that as to a citizen of the United States, enjoying all the rights of an American citizen, the legislative branch of the Government cannot lay any special restraints or restrictions on him or his property other than those laid upon all citizens alike, and these can be such only as are permitted by the Constitution; and, with equal confidence, we assert that the courts are in the highest sense bound to protect every citizen against such unconstitutional restrictions attempted to be applied by the legislature to him or his property.

In support of its conclusions, the Court of Claims quotes from Lone Wolf *vs.* Hitchcock, 187 U. S., 553, 565, to the effect that:

> "Plenary authority over the *tribal relations* of the Indians has been exercised by Congress from the

> beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government."

Both from this quotation and from an examination of the case it is manifest that the court in the Lone Wolf case was dealing solely with *tribal* property. The court itself, speaking through Mr. Justice White, says on page 568:

> "The act of June 6, 1900, which is complained of in the bill * * * dealt with the disposition of tribal property. * * * Indeed, the controversy which this case presents is concluded by the decision in Cherokee Nation *vs.* Hitchcock, 187 U. S., 294, decided at this term, where it was held that full administrative power was possessed by Congress over Indian *tribal property.*"

We respectfully submit that a case which determines solely the extent of the authority of Congress over tribal property of an Indian Tribe furnishes no basis whatever for a decision that Congress can control the separate property of the individual Indian, a citizen of the United States, held by him in fee simple. This is the distinction which the Court of Claims has entirely overlooked and which appellants urge in this court.

Appellants plant themselves on the decision in Jones *vs.* Meehan, 175 U. S., p. 1. In that case both parties claimed title through a grantee who was a member of an Indian tribe still in tribal relations with the United States. He was not a citizen of the United States, and he took title to his land through a treaty grant.

After reviewing numerous decisions relating to Indian titles by this and other courts, it is said at page 32:

> "The title to the strip of land in controversy, having been granted by the United States to the elder Chief Moose Dung, * * * and having descended * * * to Moose Dung, the younger, passed by the lease executed by the latter in 1891 to the plaintiffs for the term of that lease; and their rights under

that lease could not be divested by any subsequent action of the lessor, or of Congress, or of the executive departments."

Section 2166, United States Revised Statutes, relating to the sale of Indian lands, is confined solely to tribal lands, clearly showing the difference in the control assumed by Congress over lands held by a tribe and those held by an individual Indian in his own right.

Prior to the act of June 30, 1834 (4 Stat., 730), individual Indians were prohibited from selling their lands to others than the United States. By that act they were excluded from such prohibiton, thereby confining the restriction to tribes only, and thus demonstrating that Congress regarded an individual Indian and his property in an entirely different light from a tribe of Indians and tribal property.

Jones *vs.* Meehan, 175 U. S., 1, at p. 12.

While a tribe of Indians can sell and convey their lands to the United States only, an individual Indian has no such limitation and can sell and convey to any purchaser.

Doe *vs.* Wilson, 23 How., 457-463.

VI.

PLENARY POWER OF CONGRESS.

Plenary power of Congress over the tribal relations of Indians does not justify the taking of private property of Indians.

The Court of Claims holds that because plenary authority over the tribal relations of Indians has been exercised by Congress from the beginning, therefore Congress can lay the burdens and restrictions complained of herein on any in-

dividual Indian, a member of a tribe, and on his property, whether he be a citizen of the United States or not. Following up this proposition, the court quotes from the case of The Cherokee Nation *vs.* Hitchcock (187 U. S., 294, at 307), as follows:

> "There is no question involved in this case as to the taking of property; the authority which it proposes to exercise by virtue of the act of 1898 has relation merely to the control and development of tribal property; it still remains subject to the administrative control of the Government even though the members of the tribe have been vested with the status of citizenship under recent legislation" (R., 37).

From this decision the Court of Claims draws the conclusion, which, we respectfully submit, is erroneous:

> "That if citizenship may be conferred upon Indians while in tribal relations without affecting the administrative control of their tribal property, it follows that their communal rights in such property are not thereby removed from the control of Congress" (R., 37).

In regard to this we respectfully submit that the case of Cherokee Nation *vs.* Hitchcock, above quoted, bears no resemblance whatever to the case at bar. In that case the court states clearly that no question of the taking of property is involved. In this case the taking of property is directly involved. In that case the acts of Congress in question related merely to the control and development of certain oil property confessedly belonging to the tribe as a whole. In this case the acts in question relate directly to individual property held in fee-simple absolute and held adversely to the tribe. All that is decided in the case of The Cherokee Nation *vs.* Hitchcock is that so long as the property is held by the tribe as tribal property the mere fact of the Indians becoming citizens of the United States does not alter the character of the title, and that the Government, being in control of the

property as trustee must necessarily continue to exercise its powers as such until the property is distributed among the beneficiaries thereof. That proposition, however, has nothing whatever to do with the questions now before the court. The property here involved is not tribal, neither is it communal. It ceased to be tribal when it was selected for allotment by the petitioners and others, in accordance with the act of July 1, 1902, which was accepted and agreed to by a vote of the Cherokees, and also by the 37,560 individuals, members of the Cherokee Nation, who took allotments under the act, and by taking allotments ratified the act in accordance with section 60 thereof. It ceased to be communal property on September 1, 1902, the date fixed by agreement, as of which enrollment should be made.

We again insist that there is a broad and fundamental distinction between Indian tribal property and the individual property of a United States citizen, who happens also to be a member of an Indian tribe.

The conclusion drawn by the court is clearly a *non-sequitur*. It does not follow, as the court holds, that because the grant of citizenship to Indians does not deprive Congress of the power to administer the tribal property held by it in trust, that the rights of the individual to his own property, vested in him in fee simple absolute, can be taken in hand by Congress and administered according to its fancy. The court speaks of "communal rights" in property; we are dealing with individual rights.

The Court of Claims quotes from National Bank of Commerce *vs.* Anderson, 147 Fed. Rep., 87, 90, as follows:

> "The granting of citizenship does not affect the character of the title to land allotted to the Indians, nor is the restriction against alienation inconsistent with citizenship." (Rec., p. 37.)

Considering the second of these propositions first, we say that we do not contend that a restriction against alienation

is inconsistent with citizenship, provided the restriction accompanies the grant. Our contention only goes to the length of asserting that after the grant is made and the title is vested in the grantee, such restrictions cannot subsequently be laid on the property or its use whether the grantee be a citizen or not.

As to the first of these propositions we do not contend that the granting of citizenship affects the character of the title to land allotted to the Indians. Our contention is, that the granting of tribal land in severalty and in fee simple to individual Indians, does alter the title; and that although Congress may control the use of such lands so long as they continue tribal property, it cannot attach new conditions to a grant made to the individual Indian after the title has passed to and vested in him.

In Pennock *vs.* Commissioners (103 U. S., 44), involving the right of an Indian allottee, to whom certain lands had been patented, the court says (p. 48):

> "When the patent of the Government is once issued for the lands, all restrictions upon their alienation, not expressly named, are gone. Without such designation, inability to alienate the property would be inconsistent with the perfect title which accompanies the patent."

In Lykens *vs.* McGrath (184 U. S., 171), which involved Indian title to land, the court said (p. 171):

> "Title passed to him (Indian) by the patent, and but for the restriction he would have had the full power of alienation, the same as any holder of a fee simple title."

Murray *vs.* Walder (17 Wendell, 537-9) holds that any prohibition against alienation of lands by Indians contained in the Constitution of the United States and acts of Congress do not apply to the case of an individual Indian making contracts, or at all events not to sales of bounty lands granted

to individual Indians by the State, and that it should be confined to lands held in common by the tribes.

> "The construction of treaties is the peculiar province of the judiciary, and, except in cases purely political, Congress has no constitutional power to settle the rights under a treaty, or to affect titles already granted by the treaty itself."
>
> Wilson *vs.* Wall, 6 Wall., 83, 89.
> Reichart *vs.* Felps, 6 Wall., 160.
> Smith *vs.* Stevens, 10 Wall., 321, 327.
> Holden *vs.* Joy, 17 Wall., 211, 247.

It has been distinctly decided that:

> "An Indian who is a citizen has the same rights and privileges as any other citizen."
>
> U. S. *vs.* Ritchie, 17 Howard, 525, 539, 540.

The court quotes from the act of Congress admitting the State of Oklahoma to the Union. It will be noted that Congress simply reserves to itself the power to make treaties, agreements or laws "which it would have been competent to make if this act had never been passed." As Congress had no authority to pass the acts in question prior to the Enabling Act referred to, it certainly had none after. (Rec., p. 37.)

VII.

VALIDITY—NOT DESIRABILITY OR BENEFICENCE.

The issue herein is not the desirability or beneficence of the acts in question, but their validity.

The Court of Claims has found as a fact (R., 38) that the full-blood Indians to whom allotments have been made are "in the main" in favor of the restrictions placed upon their lands by the acts of Congress in question.

The Court does not find that either William Brown or Levi B. Gritts is now, or ever has been, in favor of, or that either has ever assented in any way whatsoever to, these new restrictions on them and their property; nor is it claimed that these acts are, or can be, of any benefit whatsoever to them. William Brown and Levi B. Gritts are the parties to this suit, and the court finds that they are "the identical persons named in the Jurisdictional Act" (R., 26, Finding XI).

Is it possible that the constitutional right of these two petitioners to control and enjoy their own individual property can be taken from them, even if it be a fact that other full-bloods are, "in the main," in favor of additional restrictions on their property, or think that such restrictions would be beneficial to the owners?

Against this Finding of Fact, however, we respectfully, but most earnestly protest, because it is not pretended by any one that the 30,000 persons affected by these acts have ever, at any time, been consulted about them; they have in no way whatsoever expressed any preference for or against them; they have not voted on them, as they did on the Act of July 1, 1902. The Court holds that perhaps 30,000 persons are affected by these acts (R., 30), and in Finding XVI (R., 28), it is held that 25,338 transactions relating to the lands of these full-blood Indians, either by deed, contracts to sell or mortgage appear upon the records of the State of Oklahoma. It may be that after these 25,338 persons who constitute the "main part" of the total of 30,000, have sold their lands, or contracted to sell or mortgage them, and received the money on such contracts, they would be in favor of any act of Congress which would give them control of their property for twenty-five years longer, with the hope that another twenty-five years would be added, so that they would enjoy both the money derived from the sale of the lands and the lands themselves.

The Court of Claims also declares in its opinion, though it

does not find it as a fact, that these acts are beneficent in their purpose, and makes this the basis, in part, of its judgment. It must have overlooked the case of The Cherokee Nation *vs.* Hitchcock (187 U. S., 294, at 308), in which this court said:

> "We are not concerned in this case with the question whether the act of June 28, 1898, and the proposed action thereunder, which is complained of, is or is not wise, and calculated to operate beneficially to the interests of the Cherokees."

Whatever may have been the purpose of the act, no claim can be made that it has been in fact beneficial to the Indians, because, first, no proof is offered and no finding is made that the act has been, in fact, a protection to the full-bloods; second, the court itself declares in Finding XVI (R., 28):

> "Since the passage of the act of April 26, 1906, *supra,* large numbers of such deeds, contracts to sell, and mortgages of their allotted lands in violation of said last-mentioned act, are being filed almost daily in the offices of the recorder of deeds of the counties of Oklahoma where the said lands are situated; and suits have been brought by the United States embracing 25,338 transactions in the United States courts of the State of Oklahoma to cancel said deeds, contracts and mortgages, upon the ground that they are a cloud upon the title of such Indians to their allotment."

Instead, therefore, of the act of April 26, 1906, being a shield and a protection, the court finds as a matter of fact that deeds, mortgages and contracts of sale for these allotted lands have been executed and recorded in large numbers since the passage of the act, the only effect of which must be that the Indians, instead of securing a fair price for their lands, are compelled to suffer a heavy discount because of this ill-advised legislation casting a cloud upon their title.

The full-blood Indians, with all other classes, selected

their individual allotments, and by so doing they surrendered their right and interest in every other allotment as provided in section 60 of the act of July 1, 1902. This constituted a valuable consideration given by each of the full-bloods for their allotments.

Notwithstanding, however, that all the classes of allottees took exactly the same kind of title and surrendered the same valuable consideration, it is now said that it is competent for Congress to select one of these classes and deny its members the free enjoyment and use of their allotments, under the claim that they are in need of protection. On this point Mr. Justice Howry, filing the dissenting opinion (R., 42), says:

> "But when the land was granted the character of the title alloted to the complainants and other full-bloods was the same as if allotted to other citizens. The title of the one became as unqualified as the title of the other, and any attempt to differentiate between the fees so held can only be sustained upon the theory that the Indian can never acquire such a right to land as the Government is bound to respect. * * * The attempt to set aside settled titles thus acquired is in violation of what the Supreme Court declared in Choctaw Nation, 119 U. S., 29, and again in U. S. *vs.* Old Settlers, 148 U. S., 473, that: 'Where, in professed pursuance of treaties, statutes have conferred valuable benefits upon Indians, which the latter have accepted, they partake of the nature of agreements—the acceptance of the benefit, coupled with the condition, implying an assent on the part of the recipient to the condition.'"

And he says (R., 41, 42):

> "But with fixed ideas as to the meaning of a grant and because no case (out of at least one hundred discussed) has been cited which sustains the proposition that land once granted can be seized and controlled by the Government except in the exercise of the right of eminent domain, I am unable to accept the Government's contention that the acts of Congress which attempt to do so are valid."

And further says (R., 47):

> "The title could not vest and yet be subject to the control of the grantor. If it could, there was no investiture. This court is in entire harmony, however, that the title did vest. When it did there was nothing left for new legislation to operate upon as to the lands which had passed out of the control of the Government. As well might it be said if money had been distributed and annuities had been paid, that subsequent legislation might provide for recovery as to say that a supplemental enactment could operate upon the title to land given absolutely to the individual."

That the operation of the act of April 26, 1906, is not beneficial but highly injurious to the Indians is made manifest by the report of the Select Committee of the Senate, being report No. 5013, 59th Cong., 2d Sess. This committee, consisting of Senators C. D. Clark, chairman of the Senate Judiciary Committee; Chester I. Long, Frank B. Brandegee, H. M. Teller, and W. A. Clark, was appointed under a resolution of the Senate of June 30, 1906—

> "To fully investigate all matters connected with the condition of affairs in the Indian Territory in relation to legislation included in the act entitled 'An act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes,' approved April 26, 1906, and kindred matters in said Territory with reference to the Five Civilized Tribes."

The committee was directed to make full and complete report, together with their conclusions and recommendations, to the Senate of the United States. They began taking testimony November 12, 1906, held sittings at numerous points in the Indian Territory, and submitted their report to the Senate, together with more than 2,000 pages of printed testimony. Instead of examining a few witnesses,

specially selected, the committee reports that "these meetings were open and free and the public was fully advised as to the date and invited to be present and give to the committee such information as might be available and offer such suggestions as might be deemed proper by the persons appearing. Special effort, and with marked success, was made to have the Indians, both those of the full blood and those of the mixed blood, fully represented." The committee further reports that amongst the questions of greatest concern considered by them was

> "The question of the restrictions upon the alienation of lands taken in allotment by the individuals of each of the Civilized Tribes."

They further say:

> "In all its inquiry and deliberations, the committee has been much embarrassed by the former legislation by Congress as to the legal status of the members of the Five Civilized Tribes. By definite and express act of Congress, March 3, 1901, each member of these tribes was made a citizen of the United States, and as such, under the Constitution, and under the terms of said law, entitled to all the rights, privileges, and immunities of every other citizen of the United States. Yet, notwithstanding this express legislative naturalization, Congress, in its subsequent legislation, and the Department of the Interior, acting under such legislation, has apparently ignored entirely this established citizenship, and in nearly every instance has treated the questions arising within the Five Civilized Tribes as though no such acts had ever been passed and as though the Indians were still in the broadest sense the wards of the Government. In other words, it appears that since the passage of the act above referred to, the Congress of the United States and the Department of the Interior have proceeded in dealing with Indian Territory affairs along the same lines as were followed before said act was passed."

As to the removal or restrictions, the committee say (Page V):

> "By the supplemental agreements made in 1902 these Indians agreed to take their lands in severalty *upon condition* that they could alienate their allotments within a certain period, which differed in the different tribes."

By the act of April 26, 1906, section 19, it is provided that no full-blood Indian shall have power to alienate, sell, dispose of, or encumber lands allotted to him for a period of twenty-five years from the approval of said act. As to this provision, the committee say:

> "We believe that this last legislation was unwise, injurious to the Indians, and of no validity. Congress, after providing in the supplemental agreements that all the lands allotted to the citizens of the different tribes should be alienable within certain periods, could not, without the consent of the Indians, extend the time in which the lands could not be alienated and add to the restrictions imposed by the original agreements. The effect of this legislation has already clouded, and, if unrepealed, will continue to cloud the title of much land in Indian Territory, and will result in endless litigation.
>
> "It will prevent the Indians from obtaining a fair price for their lands, and has been, and will continue to be, a fruitful source of dishonest transactions.
>
> "It will not prevent sales being made at the expiration of the periods designated in the supplemental agreements, and has already resulted in contracts being made for such sales. This provision is generally considered to be invalid and should be repealed."

This court is empowered to consider a public document of this character, although not embraced in the findings of the Court of Claims (New York Indians *vs.* U. S., 170 U. S., 1, at p. 32).

CONCLUSION.

In conclusion, we respectfully submit that the Court of Claims has failed to recognize that these appellants, as citizens of the United States, are entitled to the protection of the Constitution; that the property involved is individual and not tribal; that the principles of law applicable to Indian tribal property are not applicable to individual Indian property; that the law which protects the vested rights of property owners is applicable to these appellants, although they are Indians by blood, and that Congress was without power to add conditions to the title or restrictions on the individual's control of his property in this case, and that to do so would amount to the taking of property without due process of law. Therefore the court erred in dismissing the petition.

JOHN J. HEMPHILL,
WM. H. ROBESON,
DANIEL B. HENDERSON,
FRANK J. BOUDINOT,
Attorneys for Appellants.

APPENDIX A.

Cherokee Allotment Act, July 1, 1902.

[32 Statutes at Large, 716.]

An Act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of the town sites therein, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

DEFINITION OF WORDS EMPLOYED HEREIN.

SEC. 4. The word "minor" shall be held to mean males under the age of twenty-one years and females under the age of eighteen years.

SEC. 5. The terms "allottable lands" or "lands allottable" shall be held to mean all the lands of the Cherokee tribe not herein reserved from allotment.

SEC. 11. There shall be allotted by the Commission to the Five Civilized Tribes and to each citizen of the Cherokee tribe, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements.

SEC. 12. For the purpose of making allotments and designating homesteads hereunder, the forty-acre, or quarter of a quarter section, subdivision established by the Government survey may be dealt with as if further subdivided into four equal parts in the usual manner, thus making the smallest legal subdivision ten acres, or a quarter of a quarter of a quarter of a section.

SEC. 13. Each member of said tribe shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to forty acres of the

average allottable lands of the Cherokee Nation, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment. Separate certificate shall issue for said homestead. During the time said homestead is held by the allottee the same shall be nontaxable and shall not be liable for any debt contracted by the owner thereof while so held by him.

SEC. 14. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of this act.

SEC. 15. All lands allotted to the members of said tribe, except such land as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent.

SEC. 16. If for any reason an allotment should not be selected or a homestead designated by or on behalf of any member of the tribe, it shall be the duty of said Commission to make said selection and designation.

SEC. 17. In the making of allotments and in the designation of homesteads for members of said tribe, said Commission shall not be required to divide lands into tracts of less than the smallest legal subdivision provided for in section twelve hereof.

SEC. 20. If any person whose name appears upon the roll prepared as herein provided shall have died subsequent to the first day of September, nineteen hundred and two, and before receiving his allotment, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: *Provided,* That the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and proper time, the Dawes Commission shall designate the lands thus to be allotted.

SEC. 21. Allotment certificates issued by the Dawes Com-

mission shall be conclusive evidence of the right of an allottee to the tract of land described therein, and the United States Indian agent for the Union Agency shall, under the direction of the Secretary of the Interior, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to him, and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court.

SEC. 22. Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes, under the direction of the Secretary of the Interior, to determine all matters relative to the appraisement and the allotment of lands. . . .

RESERVATIONS.

SEC. 24. The following lands shall be reserved from the allotment of lands herein provided for:

(a) All lands set apart for town sites by the provisions of the act of Congress of June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), the provisions of the act of Congress of May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one), and by the provisions of this act.

(b) All lands to which, upon the date of the ratification of this act, any railroad company may, under any treaty or act of Congress, have a vested right for right of way, depots, station grounds, water stations, stock yards, or similar uses only, connected with the maintenance and operation of the railroad.

(c) All lands selected for town cemeteries not to exceed twenty acres each.

(d) One acre of land for each Cherokee schoolhouse not included in town sites or herein otherwise provided for.

(e) Four acres for Willie Halsell College at Vinita.

(f) Four acres for Baptist Mission school at Tahlequah.

(g) Four acres for Presbyterian school at Tahlequah.

(h) Four acres for Park Hill Mission school south of Tahlequah.

(i) Four acres for Elm Spring Mission school at Barren Fork.

(j) Four acres for Dwight Mission school at Sallisaw.

(k) Four acres for Shiatook Mission, near Skiatook.

(l) Four acres for Lutheran Mission school on Illinois River north of Tahlequah.

(m) Sufficient ground for burial purposes where neighborhood cemeteries are now located, not to exceed three acres each.

(n) One acre for each church house outside of towns.

(o) The square now occupied by the capitol building at Tahlequah.

(p) The grounds now occupied by the national jail at Tahlequah.

(q) The grounds now occupied by the Cherokee Advocate printing office at Tahlequah.

(r) Forty acres for the Cherokee Male Seminary near Tahlequah.

(s) Forty acres for the Cherokee Female Seminary at Tahlequah.

(t) One hundred and twenty acres for the Cherokee Orphan Asylum on Grand River.

(u) Forty acres for colored high school in Tahlequah district.

(v) Forty acres for the Cherokee Insane Asylum.

(w) Four acres for the school for blind, deaf, and dumb children near Fort Gibson.

The acre so reserved for any church or school-house in any quarter section of land shall be located where practicable in a corner of such quarter section adjacent to the section lines thereof.

ROLL OF CITIZENSHIP.

SEC. 25. The roll of citizens of the Cherokee Nation shall be made as of September first, nineteen hundred and two, and the names of all persons then living and entitled to enrollment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes.

SEC. 26. The names of all persons living on the first day of September, nineteen hundred and two, entitled to be enrolled as provided in section twenty-five hereof, shall be placed upon the roll made by said Commission, and no child born thereafter to a citizen, and no white person who has intermarried with a Cherokee citizen since the sixteenth day of December, eighteen hundred and ninety-five, shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation.

SEC. 27. Such rolls shall in all other respects be made in strict compliance with the provisions of section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), and the act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one).

SEC. 29. For the purpose of expediting the enrollment of the Cherokee citizens and the allotment of lands as herein provided, the said Commission shall, from time to time, and as soon as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the Commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the Cherokee tribe, upon which allotment of land and distribution of other tribal property shall be made. When there shall have been submitted to and approved by the Secretary of the Interior lists embracing the names of all those lawfully entitled to enrollment, the roll shall be deemed complete. The roll so prepared shall be made in quadruplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Cherokee Nation, and one to remain with the Commission to the Five Civilized Tribes.

SEC. 30. During the months of September and October, in the year nineteen hundred and two, the Commission to the Five Civilized Tribes may receive applications for enrollment of such infant children as may have been born to recognized and enrolled citizens of the Cherokee Nation on or before the first day of September, nineteen hundred and two, but the application of no person whomsoever for enrollment shall be received after the thirty-first day of October, nineteen hundred and two.

SEC. 31. No person whose name does not appear upon the roll prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this act: *Provided,* That no allotment of land or other tribal property shall be made to any person, or to the heirs of any person, whose name is on said roll and who died prior to the first day of September, nineteen hundred and two. The right of such person to any interest in the lands or other tribal prop-

erty shall be deemed to have become extinguished and to have passed to the tribe in general upon his death before said date, and any person or persons who may conceal the death of any one on said roll as aforesaid for the purpose of profiting by said concealment, and who shall knowingly receive any portion of any land or other tribal property or of the proceeds so arising from any allotment prohibited by this section, shall be deemed guilty of a felony, and shall be proceeded against as may be provided in other cases of felony, and the penalty for this offense shall be confinement at hard labor for a period of not less than one year nor more than five years, and in addition thereto a forfeiture to the Cherokee Nation of the lands, other tribal property, and proceeds so obtained.

TITLES.

SEC. 58. The Secretary of the Interior shall furnish the principal chief with blank patents necessary for all conveyances herein provided for, and when any citizen receives his allotment of land, or when any allotment has been so ascertained and fixed that title should under the provisions of this act be conveyed, the principal chief shall thereupon proceed to execute and deliver to him a patent conveying all the right, title, and interest, of the Cherokee Nation, and of all other citizens, in and to the lands embraced in his allotment certificate.

SEC. 59. All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title, and interest of the United States in and to the lands embraced in his patent.

SEC. 60. Any allottee accepting such patent shall be deemed to assent to the allotment and conveyance of all the lands of the tribe as provided in this act, and to relinquish all his right, title, and interest to the same, except in the proceeds of lands reserved from allotment.

SEC. 61. The acceptance of patents for minors and incompetents by persons authorized to select their allotments for them shall be deemed sufficient to bind such minors and incompetents as to the conveyance of all other lands of the tribe.

SEC. 62. All patents, when so executed and approved, shall be filed in the office of the Dawes Commission, and recorded in a book provided for the purpose, until such time

as Congress shall make other suitable provision for record of land titles, without expense to the grantee, and such records shall have like effect as other public records.

MISCELLANEOUS.

SEC. 63. The tribal government of the Cherokee Nation shall not continue longer than March fourth, nineteen hundred and six.

SEC. 64. The collection of all revenues of whatsoever character belonging to the tribe shall be made by an officer appointed by the Secretary of the Interior, under rules and regulations to be prescribed by the said Secretary.

SEC. 65. All things necessary to carry into effect the provisions of this act, not otherwise herein specifically provided for, shall be done under the authority and direction of the Secretary of the Interior.

SEC. 66. All funds of the tribe, and all moneys accruing under the provisions of this act, shall be paid out under the direction of the Secretary of the Interior, and when required for per capita payments shall be paid directly to each individual by an appointed officer of the United States, under the direction of the Secretary of the Interior.

SEC. 67. The Secretary of the Interior shall cause to be paid all just indebtedness of said tribe existing at the date of the ratification of this act which may have lawfully been contracted, and warrants therefor regularly issued upon the several funds of the tribe, as also warrants drawn by authority of law hereafter and prior to the dissolution of the tribal government, such payments to be made from any funds in the United States Treasury belonging to said tribe, and all such indebtedness of the tribe shall be paid in full before any pro rata distribution of the funds of the tribe shall be made. The Secretary of the Interior shall make such payments at the earliest time practicable and he shall make all needed rules and regulations to carry this provision into effect.

SEC. 69. After the expiration of nine months after the date of the original selection of an allotment by or for any citizen of the Cherokee tribe as provided in this act, no contest shall be instituted against such selection, and as early thereafter as practicable patent shall issue therefor.

SEC. 70. Allotments may be selected and homesteads designated for minors by the father or mother, if citizens, or by a

guardian, or curator, or the administrator having charge of their estate, in the order named; and for prisoners, convicts, aged and infirm persons, and soldiers and sailors of the United States on duty outside of the Indian Territory, by duly appointed agents under power of attorney; and for incompetents by guardians, curators, or other suitable persons akin to them; but it shall be the duty of said Commission to see that said selections are made for the best interests of such parties.

SEC. 72. Cherokee citizens may rent their allotments when selected for a term not to exceed one year for grazing purposes only and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same; but leases for a period longer than one year for grazing purposes, and for a period longer than five years for agricultural purposes, and for mineral purposes, may also be made with the approval of the Secretary of the Interior, and not otherwise. Any agreement or lease of any kind or character violative of this section shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity. Cattle grazed upon leased allotments shall not be liable to any tribal tax, but when cattle are introduced into the Cherokee Nation and grazed on lands not selected as allotments by citizens the Secretary of the Interior shall collect from the owners thereof a reasonable grazing tax for the benefit of the tribe, and section twenty-one hundred and seventeen of the Revised Statutes of the United States shall not hereafter apply to Cherokee lands.

SEC. 73. The provisions of section thirteen of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled "An act for the protection of the people of the Indian Territory, and for other purposes," shall not apply to or in any manner affect the lands or other property of said tribe, and no act of Congress or treaty provision inconsistent with this agreement shall be in force in said nation except sections fourteen and twenty-seven of said last-mentioned act, which shall continue in force as if this agreement had not been made.

SEC. 74. This act shall not take effect or be of any validity until ratified by a majority of the whole number of votes cast by the legal voters of the Cherokee Nation in the manner following:

SEC. 75. The principal chief shall, within ten days after the passage of this act by Congress, make public proclamation that the same shall be voted upon at a special election to be held for that purpose within thirty days thereafter, on a certain date therein named, and he shall appoint such officers and make such other provisions as may be necessary for holding such election. The votes cast at such election shall be forthwith duly certified as required by Cherokee law, and the votes shall be counted by the Cherokee national council, if then in session, and if not in session the principal chief shall convene an extraordinary session for the purpose, in the presence of a member of the Commission to the Five Civilized Tribes, and said member and the principal chief shall jointly make certificate thereof and proclamation of the result and transmit the same to the President of the United States.

Approved by President, July 1, 1902.

Ratified by Cherokee people, August 7, 1902.

Proclaimed by Tams Bixby, acting chairman Commission to the Five Civilized Tribes, and T. M. Buffington, Principal Chief, Cherokee Nation, August 12, 1902.

APPENDIX B.

The Jurisdictional Act, March 1, 1907.

[34 Stat. L., 1015.]

That William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens, having like interests in the property allotted under the act of July first, nineteen hundred and two, entitled "An act to provide for the allotment of lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes," and David Muskrat and J. Henry Dick, on their own behalf, and on behalf of all Cherokee citizens enrolled as such for allotment as of September first, nineteen hundred and two, be, and they are hereby, authorized and empowered to institute their suits in the Court of Claims to determine the validity of any acts of Congress passed since the said act of July first, nineteen hundred and two, in so far as said acts, or

any of them, attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September first, nineteen hundred and two, and provided for in the said act of July first, nineteen hundred and two.

And jurisdiction is hereby conferred upon the Court of Claims, with the right of appeal, by either party, to the Supreme Court of the United States, to hear, determine and adjudicate each of said suits.

The suits brought hereunder shall be brought on or before September first, nineteen hundred and seven, against the United States as a party defendant, and for the speedy disposition of the questions involved, preference shall be given to the same by said courts, and by the Attorney-General, who is hereby charged with the defense of said suits.

Upon the rendition of final judgment by the Court of Claims, or the Supreme Court of the United States, denying the validity of any portion of the said acts, authorized to be brought into question, in either or both of said cases, the Court of Claims shall determine the amount to be paid the attorneys employed by the above-named parties in the prosecution thereof, for services and expenses, and shall render judgment therefor, which shall be paid out of the funds in the United States Treasury belonging to the beneficiaries under the said act of July first, nineteen hundred and two.

APPENDIX C.

Act of March 11, 1904.

[33 Stat., 65.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is hereby authorized and empowered to grant a right of way in the nature of an easement for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through any

Indian reservation, through any lands held by an Indian tribe or nation in the Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from, and the maps of definite location of said lines approved by, the Secretary of the Interior: *Provided*, That the construction of lateral lines from the main pipe line establishing connection with oil and gas wells on the individual allotments of citizens may be constructed without securing authority from the Secretary of the Interior and without filing maps of definite location, when the consent of the allottee upon whose lands oil or gas wells may be located and of all other allottees through whose lands said lateral pipe lines may pass has been obtained by the pipe line company: *Provided further*, That in case it is desired to run a pipe line under the line of any railroad, and satisfactory arrangements cannot be made with the railroad company, then the question shall be referred to the Secretary of the Interior, who shall prescribe the terms and conditions under which the pipe line company shall be permitted to lay its lines under said railroad. The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval. And where such lines are not subject to State or Territorial taxation the company or owner of the line shall pay to the Secretary of the Interior, for the use and benefit of the Indians, such annual tax as he may designate, not exceeding five dollars for each ten miles of line so constructed and maintained under such rules and regulations as said Secretary may prescribe. But nothing herein contained shall be so construed as to exempt the owners of such lines from the payment of any tax that may be lawfully assessed against them by either State, territorial, or municipal authority. And incorporated cities and towns into and through which such pipe lines may be constructed shall have the power to regulate the manner of construction

therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such towns and cities, and nothing herein shall authorize the use of such right of way except for pipe lines, and then only so far as may be necessary for its construction, maintenance, and care: *Provided*, That the rights herein granted shall not extend beyond a period of twenty years: *Provided further*, That the Secretary of the Interior, at the expiration of said twenty years, may extend the right to maintain any pipe line constructed under this act for another period not to exceed twenty years from the expiration of the first right, upon such terms and conditions as he may deem proper.

SEC. 2. The right to alter, amend, or repeal this act is expressly reserved.

APPENDIX D.

Act of April 26, 1906.

[34 Stat., 137.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That after the approval of this act no person shall be enrolled as a citizen or freedman of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes of Indians in the Indian Territory, except as herein otherwise provided, unless application for enrollment was made prior to December first, nineteen hundred and five, and the records in charge of the Commissioner to the Five Civilized Tribes shall be conclusive evidence as to the fact of such application; and no motion to reopen or reconsider any citizenship case, in any of said tribes, shall be entertained unless filed with the Commissioner to the Five Civilized Tribes within sixty days after the date of the order or decision sought to be reconsidered except as to decisions made prior to the passage of this act, in which cases such motion shall be made within sixty days after the passage of this act: *Provided*, That the Secretary of the Interior may enroll persons whose names appear upon any of the tribal rolls and for whom the records in charge of the Commissioner to the Five Civilized Tribes show application was

made prior to December first, nineteen hundred and five, and which was not allowed solely because not made within the time prescribed by law.

SEC. 2. That for ninety days after approval hereof applications shall be received for enrollment of children who were minors living March fourth, nineteen hundred and six, whose parents have been enrolled as members of the Choctaw, Chickasaw, Cherokee, or Creek tribes, or have applications for enrollment pending at the approval hereof, and for the purpose of enrollment under this section illegitimate children shall take the status of the mother, and allotments shall be made to children so enrolled. If any citizen of the Cherokee tribe shall fail to receive the full quantity of land to which he is entitled as an allotment, he shall be paid out of any of the funds of such tribe a sum equal to twice the appraised value of the amount of land thus deficient. The provisions of section nine of the Creek agreement ratified by act approved March first, nineteen hundred and one, authorizing the use of funds of the Creek tribe for equalizing allotments, are hereby restored and reënacted, and after the expiration of nine months from the date of the original selection of an allotment of land in the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, and after the expiration of six months from the passage of this act as to allotments heretofore made, no contest shall be instituted against such allotment: *Provided*, That the rolls of the tribes affected by this act shall be fully completed on or before the fourth day of March, nineteen hundred and seven, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date: *Provided further*, That nothing herein shall be construed so as to hereafter permit any person to file an application for enrollment in any tribe where the date for filing application has been fixed by agreement between said tribe and the United States: *Provided*, That nothing herein shall apply to the intermarried whites in the Cherokee Nation, whose cases are now pending in the Supreme Court of the United States.

SEC. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period,

be removed by the act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: *Provided, however,* That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: *Provided further,* That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal or restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void: *Provided further,* That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.

SEC. 20. That after the approval of this act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval: *Provided,* That allotments of minors and incompetents may be rented or leased under order of the proper court: *Provided further,* That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory.

SEC. 21. That if any allottee of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes die intestate without widow, heir or heirs, or surviving spouse, seized of all or any

portion of his allotment prior to the final distribution of the tribal property, and such fact shall be known by the Secretary of the Interior, the lands allotted to him shall revert to the tribe and be disposed of as herein provided for surplus lands; but if the death of such allottee be not known by the Secretary of the Interior before final distribution of the tribal property, the land shall escheat to and vest in such State or Territory as may be formed to include said lands. That heirs of deceased Mississippi Choctaws who died before making proof of removal to and settlement in the Choctaw country and within the period prescribed by law for making such proof may within sixty days from the passage of this act appear before the Commissioner to the Five Civilized Tribes and make such proof as would be required if made by such deceased Mississippi Choctaws; and the decision of the Commissioner to the Five Civilized Tribes shall be final therein, and no appeal therefrom shall be allowed.

SEC. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe.

SEC. 23. Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided*, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States commissioner.

SEC. 25. That any light or power company doing business within the limits of the Indian Territory, in compliance with the laws of the United States that are now or may be in force therein, be, and the same are hereby, invested and empowered with the right of locating, constructing, owning, operating, using, and maintaining canals, reservoirs, auxiliary steam works, and a dam or dams across any nonnavigable stream within the limits of said Indian Territory, for the purpose of obtaining a sufficient supply of water to manufacture and generate water, electric, or other power, light, and heat and to utilize and transmit and distribute such power, light, and heat to other places for its own use or other individuals or corporations, and the right of locating, constructing, owning, operating, equipping, using, and maintaining the necessary pole lines and conduits for the purpose of transmitting and distributing such power, light, and heat to other places within the limits of said Indian Territory.

That the right to locate, construct, own, operate, use, and maintain such dams, canals, reservoirs, auxiliary steam works, pole lines, and conduits in or through the Indian Territory, together with the right to acquire, by condemnation, purchase or agreement between the parties, such land as it may deem necessary for the locating, constructing, owning, operating, using, and maintaining of such dams, canals, reservoirs, auxiliary steam works, pole lines, and conduits in or through any land held by any Indian tribe or nation, person, individual, corporation, or municipality in said Indian Territory, or in or through any lands in said Indian Territory which have been or may hereafter be allotted in severalty to any individual Indian or other person under any law or treaty, whether the same have or have not been conveyed to the allottee, with full power of alienation, is hereby granted to any company complying with the provisions of this act: *Provided*, That the purchase from and agreements with individual Indians, where the right of alienation has not theretofore been granted by law, shall be subject to approval by the Secretary of the Interior.

In case of the failure of any light or power company to make amicable settlement with any individual owner, occupant, allottee, tribe, nation, corporation, or municipality for any lands or improvements sought to be condemned or appropriated under this act all compensation and damages to be

paid to the dissenting individual owner, occupant, allottee, tribe, nation, corporation, or municipality by reason of the appropriation and condemnation of said lands and improvements shall be determined as provided in sections fifteen and seventeen of an act of Congress entitled "An act to grant a right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February twenty-eighth, nineteen hundred and two (public, numbered twenty-six), and all such proceedings hereunder shall conform to said sections, except that sections three and four of said act shall have no application, and except that hereafter the plats required to be filed by said act shall be filed with the Secretary of the Interior and with the Commissioner to the Five Civilized Tribes, and where the words "Principal Chief or Governor" of any tribe or nation occur in said act, for the purpose of this act there is inserted the words Commissioner to the Five Civilized Tribes. Whenever any such dam or dams, canals, reservoirs, and auxiliary steam works, pole lines and conduits are to be constructed within the limits of any incorporated city or town in the Indian Territory, the municipal authorities of such city or town shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such cities and towns: *Provided,* That all rights granted hereunder shall be subject to the control of the future Territory or State within which the Indian Territory may be situated.

APPENDIX E.

Act of June 21, 1906.

[34 Stat. L., 321.]

That section two of the act entitled "An act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," approved April twenty-sixth, nineteen hundred and six, be, and the same is hereby, amended by striking out thereof the words "*Provided further,* That nothing herein shall be

construed so as to hereafter permit any person to file an application for enrollment in any tribe where the date for filing application has been fixed by agreement between said tribe and the United States: *Provided further,* That nothing herein shall apply to the intermarried whites in the Cherokee Nation whose cases are now pending in the Supreme Court of the United States." And insert in said act in lieu of the matter repealed, the following: *Provided further,* That nothing herein shall be construed so as hereafter to permit any person to file an application for enrollment or to be entitled to enrollment in any of said tribes, except for minors the children of Indians by blood, or of freedmen members of said tribes, or of Mississippi Choctaws identified under the fourteenth article of the treaty of eighteen hundred and thirty, as herein otherwise provided, and the fact that the name of a person appears on the tribal roll of any of said tribes shall not be construed to be an application for enrollment.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 331.

WILLIAM BROWN AND LEVI B. GRITTS ET AL.,
APPELLANTS,

vs.

THE UNITED STATES.

ON APPEAL FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF STATE OF OKLAHOMA.

Comes now Charles West, Attorney General of the State of Oklahoma, and in pursuance of leave of court heretofore granted on November 29, files this brief on behalf of the State of Oklahoma.

The State of Oklahoma is interested in the determination of the above-entitled cause for the reason that the determination of the same will materially affect the revenues of the State, in that there are 26,748 full-blood Indians, owning 5,371,905 acres of land, worth approximately $10 per acre, and aggregating over fifty millions of dollars, which property will either go on or off the tax schedules of Oklahoma, at the

period of alienation or taxability as determined in this case. A letter from Hon. R. G. Valentine, Commissioner of Indian Affairs, showing the full-blood population of the Five Civilized Tribes and the total area of lands allotted to full-bloods, is hereto attached and marked "Exhibit A." If the act of April 26, 1906, extending the restrictions (sections 19, 20, 22), the McCumber amendment, is held invalid this property will go on the tax schedules after the expiration of the period of restrictions fixed by the original agreements of the five tribes. Otherwise this property may not go on the tax schedules until August 7, 1931, or until the restrictions are otherwise removed under the law, or by the judgment of the courts.

Statement of the Case.

Brown and Gritts are citizens of the State of Oklahoma, and were made citizens of the United States by the act of March 3, 1901 (24 Stats., 390, and 31 Stats., 1447, chap. 868). By race, however, they happen to be Cherokees of pure Indian blood, commonly called full-bloods.

After they had been made citizens of the United States in 1901, Congress passed an act on July 1, 1902 (32 Stats., 716), proposing the allotment of the lands and distribution of property owned by them by communal title. The act of July 1, 1902, was substantially the same as an agreement which had been drawn up and submitted to the Cherokee people in 1901, and by popular vote rejected.

This act proposed that the United States should be authorized by the vote of the owners of the property to distribute the property as of September 1, 1902, giving each citizen then living 110 acres of average allottable land and paying to each citizen then living his distributive share of the other property owned by them.

This act was not to be valid (could not have been valid) unless ratified by a majority of the owners of the communal property (sections 74 and 75.).

The communal title ended by this agreement (sections 20, 25, 26, and 31), and became an individualized title as to the allotments and a title in common owned by those citizens living September 1, 1902, and none others. The statute was ratified providing that the property should be distributed to those citizens of the Cherokee Nation entitled to enrollment and living on the first day of September, 1902, and none others (section 31), and expressly providing that any person born thereafter, the child of a Cherokee citizen, should *not be enrolled* or participate in the distribution of the tribal property (section 26), and that the distributive share of any enrolled citizen living September 1, 1902, shall descend to his heirs, if he die (section 20). (32 Stats., 718.)

The communal title ended therefore on September 1, 1902, and the title to the former tribal property became *a title in common,* owned by 37,561 citizens of the United States, and the proceeds of which was to be distributed to them by the United States as an agency (sections 31, 67, 65.)

The Cherokee people, as a community, had received the title to this land in fee simple by the treaty of 1828, and had never parted with the title or any part of it.

The Cherokee people were therefore collectively the grantors of the individual allotments to themselves severally, and imposed the restrictions against alienation, as such grantors, upon themselves as individual grantees, and the United States was not the grantor of the individual allotments and imposed no restrictions as grantor, and had no power in any other capacity (not being guardian) to impose restrictions against alienation on the lands so acquired and owned by these citizens of the United States (Jones *vs.* Meehan, 175 U. S., 1).

The statute agreement provided that the allotment certificates issued by the Dawes commission should be *conclusive evidence of the right of an allottee to the tract of land described therein* (section 21). Brown and Gritts received a

fee-simple title to such allotted lands. The Court of Claims held (Record, 29, conclusions of law, paragraph 5) that:

> "The issuance of allotment certificates and allotment deeds, in conformity with the provisions of said act of July 1, 1902, to individual Cherokee allottees, including the petitioners, vested in them the fee-simple title to the lands described in said allotment certificates and allotment deeds respectively."

The Cherokee people, as grantors of the title, in ratifying the act of July 1, 1902, and *not* the United States, imposed the following conditions upon the land, restricting alienation, to wit (sections 13, 14, 15, 32 Stats., 717):

> "Each member of said tribe shall, at the time of the selection of his allotment, designate as *a homestead* out of said allotment land equal in value to *forty acres* of the average allotable lands of the Cherokee Nation, as nearly as may be, which shall be *inalienable during the lifetime of the allottee, not exceeding twenty-one years* from the date of the certificate of allotment. Separate certificate shall issue for said homestead. During the time said homestead is held by the allottee the same shall be *non-taxable*, and shall not be liable for any debt contracted by the owner thereof while so held by him.
>
> "*Lands allotted to citizens shall not* in any manner whatever, or at any time, be encumbered, taken, or sold to secure or satisfy any debt or obligation, or *be alienated* by the allottee or his heirs, before the expiration of *five years from the date of the ratification of this act.*
>
> "All lands allotted to the members of said tribe, except such land as is set aside to each for a homestead as herein provided, shall be alienable in *five years after issuance of patent.*"

A 40-acre homestead was thus inalienable and declared *non-taxable* during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment, and other allotted lands could not be alienated for five years

from the date of the ratification of the act. All surplus allotted land was thus subject to taxation within the boundaries of the late Cherokee Nation after August 7, 1907, and when Oklahoma was admited to the Union, November 16, 1907.

On April 26, 1906, Congress passed an act (34 Stats., 137) providing that *"no full-blood Indian"* of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes *"shall have power to alienate, sell, dispose of* or encumber in any manner any of the lands allotted to him for a period of twenty-five years, etc.," unless such restriction shall, prior to expiration of said period, be removed by act of Congress (section 19.)

Other minor disabilities were proposed in this act to be imposed upon persons of the pure Indian blood belonging to the late Five Civilized Tribes.

On May 27, 1908, after the State of Oklahoma had entered the Union, Congress passed an act entitled "An act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes," providing as follows:

> "CHAP. 199. An act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes.
>
> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after sixty days from the date of this act *the status of the lands allotted heretofore or hereafter* to allottees of the Five Civilized Tribes, shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, except homesteads, of said allottees enrolled as mixed-blood Indians, having half or more than half and less than three-quarters Indian blood, shall be free from all restrictions. *All homesteads of said allottees enrolled as mixed-blood Indians, having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more*

> *Indian blood, including minors of such degrees of blood, shall not be subject to alienation*, contract to sell, power of attorney, or any other incumbrance *prior to April twenty-sixth, nineteen hundred and thirty-one*, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe" (35 Stats., 312).

Here Congress, under the title of "An act for the removal of restrictions," has attempted to impose additional restrictions on the period of alienation of lands of citizens who are of half or more Indian blood, while it provides that the Secretary of the Interior may remove the restrictions, wholly or in part, of lands of persons of half or more Indian blood, and impose rules on the "disposal of the *proceeds*" thereof.

The "proceeds" of these lands were not subjected to the control of the Interior Department by any previous act.

It is obvious that these two latter statutes are based on the theory that the allottees of the Five Civilized Tribes are still wards and aliens, subject to the supervisory control of the United States in regard to the alienation of their lands, even after such persons have been made full citizens of the United States and after such persons have become full citizens of the sovereign State of Oklahoma.

If this contention be true and Congress can declare that these citizens shall not "have power" to sell their property and can fix the status of the lands allotted and previously conveyed in fee simple so as to inhibit the sale, alienation or encumbrance prior to April 26, 1931, it may exercise such authority permanently and prevent these lands from being taxable at any time by the State of Oklahoma, and may at any future time interfere with the personal rights of these citizens of Oklahoma and deprive them of constitutional guaranteed immunities.

Section 4 of this act provides:

> *"That all land from which restrictions have been or shall be removed shall be subject to taxation* and all other civil burdens *as though it were the property of other persons than allottees* of the Five Civilized Tribes",

thus raising the implication that the lands *shall not* be taxable as long as Congress chooses to extend restrictions, and that the citizen allottees have not the same personal rights under the constitution and laws as other citizens of Oklahoma.

For brevity's sake we omit all minor matters and in this brief shall confine ourselves to the inquiry as to the validity of the McCumber amendment, which declares that, "no full-blood Indian of the" * * * "Cherokee" * * * "Tribe *shall have power* to alienate lands allotted to him for a period of twenty-five years" from the approval of the act.

ARGUMENT.

If Congress could forbid Brown and Gritts to alienate land held by them in fee simple, it must be:

First, either because the United States had control over them personally as "wards" or,

Second, because the United States, as grantor of the land could attach valid conditions to the title of the land forbidding alienation.

The United States no Capacity as Grantor of Title.

No contention is made or could be made that the United States is grantor of the land or as grantor could impose conditions upon alienation. The United States had parted with all title to these lands in 1828. The land was owned *by the whole Cherokee people* (art. 1, treaty 1846), who became the

grantors under the act of July 1, 1902, and, as grantors, imposed certain limited restrictions against alienation, to wit: 21 years on the homestead allotment and five years on the surplus allotment. The Cherokee people deemed this abundant protection. The probate courts in existence in Indian Territory under the control of the United States court provided adequate protection for all defective citizens, including incompetents, and this provision, that the allottee should have a title of which he might not divest himself for 21 years as to the homestead and for five years as to the surplus, was deemed sufficient both by the Cherokees and by the Congress of the United States. The Cherokee people, as grantors, had a right to impose these conditions upon Brown and Gritts, and when Brown and Gritts accepted the title with these conditions they could not divest themselves of the title to their homesteads for 21 years nor of the surplus for five years.

(Schrimsher *vs.* Stockton, 183 U. S., 290.)

The United States Circuit Court of Appeals for the Eighth Circuit in the Allen cases decided, June 8, 1910, in speaking of the right of the United States, conceded that the United States had no legal or equitable estate in the Cherokee allotted lands in the following language:

> "It will be conceded at the outset that it has no legal or equitable estate in the allotments; and if such is necessary it has no standing in court" (United States *vs.* Allen, 179 Fed. Rep., 13, at page 16, last paragraph).

The court also said (page 15), in regard to these suits referred to by the Court of Claims as involving 25,338 transactions that,

> "The allottees are not made parties either as plaintiff or defendant, and it is not charged in the bills that the conveyances were obtained by fraud, misrepresentation, or for an inadequate consideration.

> They are assailed solely upon the ground that they were made in violation of the restrictions which Congress imposed upon the alienation of the allotments."

Notwithstanding the fact that the United States was not the grantor of the allotment and had no legal or equitable estate in the allotment various authorities have been gravely cited by the Court of Claims and counsel for the United States, in which the United States was grantor and trustee of the title, to illustrate the point that the United States had exercised authority over "Indian lands" after the "Indians" had become citizens of the United States. For example, the case of the United States *vs.* Rickert, 188 U. S., 433, in which the United States was grantor and trustee of the title for 25 years for the sole use of the allottee and therefore had a right to defend such land against taxation. Of like purport are the cases of Beck *vs.* Flournoy Live Stock and Realty Co., 71 Fed., 576. In these cases the United States was grantor and trustee of the title. Of like purport are the cases of the National Bank of Commerce *vs.* Anderson, 147 Fed., 87, the United States *vs.* Thurston County, 143 Fed., 287, where the United States held the proceeds of trust lands subject to a like trust. The case of The United States *vs.* Dooley, 151 Fed., 697, likewise was a case where the United States was holder of a title in trust. None of these cases justifies any interference with or assertion of right over the title to land where the United States was not grantor and was not a trustee.

It appears to be obvious that since the United States was not grantor of the land to Brown and Gritts and was not trustee of the title and had no legal or equitable estate in such allotments, it could not attach conditions to the allotments in the capacity of grantor or exercise any right as trustee of the title.

THE UNITED STATES NO CAPACITY AS GUARDIAN.

The only remaining basis upon which it may be assumed that the United States had a right to *forbid* Brown and Gritts to alienate land held by them in fee simple is the power of guardianship asserted by Government counsel.

The United States was not a guardian of Brown and Gritts on April 26, 1906, and had no right to assume the power of guardianship over them on that date.

The Constitution of the United States authorizes Congress to regulate commerce with Indian tribes, and the courts have held that the Indian people, *prior* to the grant of citizenship, were domestic, dependent "aliens," "in a state of pupilage" "owing no allegiance to the State, and receiving no protection from the State," and that "the duty of protecting the Indians carries with it the power to protect."

Cherokee Nation *vs.* Georgia, 5 Peters, 1.
Worcester *vs.* Georgia, 6 Peters, 512.
Elk *vs.* Wilkins, 112 U. S., 94 (Nov. 3, 1884).
U. S. *vs.* Kagama, 118 U. S., 375.
Stevens *vs.* Cherokee Nation, 174 U. S., 477.
Lone Wolf *vs.* Hitchcock, 187 U. S., 553.
Cherokee Nation *vs.* Hitchcock, 187 U. S., 294.

After the case of Elk *vs.* Wilkins was decided, in 1884, Congress, in 1887, passed the Dawes allotment act, by which any Indian taking up his residence *separate and apart* from the tribe should have full citizenship of the United States.

All of those cases above cited deal with the Indian people **prior to the grant of citizenship;** deal with them at a time when they were not citizens of the United States, but occupying the legal status of Indians, as aliens, wards, dependents, owing no allegiance to the States nor to the United States.

The last case of the Cherokee Nation *vs.* Hitchcock arose over the question of the validity of a provision of the act of June 28, 1898, authorizing the Secretary of the Interior to

make leases of certain oil lands of the Cherokee people, and was held to be a valid exercise of power, the property being tribal property at the time (1898) and the Cherokees not having been then declared citizens of the United States.

None of the cases referred to *supra* have any persuasive force in establishing the right of the United States to assert guardianship over citizens of the United States. They constitute no precedent warranting the interference with the title held by private persons in fee simple who, though of Indian blood, have become citizens of the United States, because they all relate to Indians, PRIOR TO THE GRANT OF CITIZENSHIP, while such Indians were still dependent ALIENS.

The attorneys representing the United States and the Secretary of the Interior in these suits attempt to break the force of the grant of citizenship, first, *by precedents,* and second, by argument from the statutes.

1st. The precedents quoted to sustain the theory of guardianship are as above cited. Cherokee Nation *vs.* Georgia, 5 Peters, 1; Worcester *vs.* Georgia, 6 Peters, 512; U. S. *vs.* Kagama, 118 U. S., 375; Stevens *vs.* Cherokee Nation, 174 U. S., 477; Lonewolf *vs.* Hitchcock, 187 U. S., 553; Cherokee Nation *vs.* Hitchcock, 187 U. S., 294.

In every one of these cases the questions passed upon arose prior to 1901 and prior to the full grant, recognition, or assertion of United States citizenship, and were based upon the uncontradicted theory that *the Indians had not been granted the right of citizenship.* These cases are, therefore, not in point and have no persuasive force.

2d. It is contended by Government counsel that the joint resolution of March 2, 1906, and section 28 of the act of April 26, 1906, extended the tribal existence and the tribal governments after March 4, 1906, and by these acts the Congress, notwithstanding the previous grant of citizenship, treated them as "tribal Indians," and the Court of Claims says: "By these acts the Government asserted its continued guardianship" (Rec., Muskrat Case, 330, p. 32, § 3).

This contention could not be maintained (even if Congress had had any such purpose, which it most emphatically had not) under the decision of the Supreme Court of the United States in *In re* Heff, 197 U. S., 488, in which the court said:

> "We are of the opinion that *when the United States grants the privileges of citizenship to an Indian,* gives to him the benefit of and requires him to be subject to the laws, both civil and criminal, of the State, it places him outside the reach of police regulations on the part of Congress; *that the emancipation from Federal control, thus created, cannot be set aside at the instance of the Government without the consent of the individual Indian and the State*" (pp. 509).

The court also said in this case that the argument made by the Solicitor General in the Heff case was unsound in the implication:

> "That, *so long as an individual is an Indian by descent, Congress, although it may have granted all the rights and privileges of national, and therefore State, citizenship,* the benefits and burdens of the laws of the State *may at any time repudiate this action* and *reassume its guardianship,* and prevent the Indian from enjoying the benefit of the laws of the State and release him from obligation or obedience thereto" (pp. 508).

The Supreme Court, therefore, holding that the United States cannot reassume guardianship, fully answers the contention that Congress, by the joint resolution of March 2, 1906, and the act of April 26, 1906, section 28, did reassume guardianship. In reality Congress had no intention whatever to reassume or to assert guardianship by the joint resolution and act aforesaid. The existence or the continuance of a tribal relation does not, however, necessarily affect United States citizenship nor necessarily make a member of a tribe either a ward or an alien.

U. S. *vs.* Rogers, 4 Howard, 567.

The language of the joint resolution extending the tribal existence was "for ALL PURPOSES UNDER EXISTING LAWS" (and none other), and the language of the act of April 26, 1906, extending the tribal existence and the present tribal governments was "for ALL PURPOSES AUTHORIZED BY LAW" (and none other).

What does this language mean? What were the PURPOSES "under existing law?" The tribal courts had been abolished by the act of June 28, 1898 (30 Stat., 485), section 28; the enforcement of their laws prohibited in section 26; their treasury terminated by section 19; the Dawes Commission instructed to make up a final roll of persons entitled to tribal property (section 21), and to allot the same (section 11). The tribal existence and tribal government for ALL PURPOSES UNDER EXISTING LAW must be determined under the Curtis Act of 1898 and the Cherokee Allotment Act of July 1, 1902.

The Cherokee Allotment Act of July 1, 1902, gave the consent of the Cherokees by vote that the United States should make the final rolls as of September 1, 1902, and acquiesced and consented to the change of status. The tribal laws had been abolished; the tribal courts had been abolished; the judges, the legislature, and the principal chief could not be re-elected by the Cherokees, in pursuance of Cherokee law, there being no law in force, and no tribal treasury, and no authority to pass, adjudicate, or enforce such laws if they had been elected. Therefore, there was *no legal judiciary*. When the term of office of the legislature expired it was *sine die*, and *no legal legislature* remained. When the term of office of the principal chief expired he was *not legal principal chief*, and his sole authority remaining under the agreement (not law) was to sign his name to patents, the law providing, however, that he might be set aside by the Secretary of the Interior and some Indian citizen appointed in his place to sign patents. Even the patents were inconsequential, being merely evidence of title, the title itself expressly passing with the allotment certificate, which,

by the terms of the agreement, was "conclusive evidence" of title (section 21). The collection of all revenues was put in the hands of the United States (section 64). All funds due the members of the tribes were agreed to be paid by the Interior Department (section 66).

What were the *"purposes under existing law"* for which the tribal existence and tribal government was extended? Absolutely nothing, except THE PURPOSES INVOLVED IN the distribution by the United States of the remaining property owned by the members of the late Cherokee tribe. The United States had agreed (as an agency, *but not as trustee of any title*) to distribute the Cherokee property in equal parts among the members of the Cherokee community. And when the United States made these agreements they were made not with Indians, legally speaking, but with citizens of the United States, who were not, legally speaking, Indians at all.

An Indian, in law, is "an alien," "a ward," a man of inferior political status, "in a condition of pupilage."

A citizen of the United States, although of full Indian blood, is not an alien, is not a ward, is not of inferior political status, and is not in a condition of pupilage and is *not an "Indian" in law.*

For example, the laws of the United States forbid liquor to be sold *an Indian.* Albert Heff, at Horton, Kansas, sold John Butler, a full-blood Kickapoo Indian, liquor. He was convicted, but, on *habeas corpus,* the Supreme Court held Heff had not violated the statute forbidding the sale of liquor to an Indian, although he had sold liquor to John Butler, a full-blood Kickapoo Indian, because John Butler, an Indian by blood, was not *an Indian in law*, but a *citizen of the United States.*

An Indian tribe, in like manner, to fall within the decisions of "domestic dependent aliens," "wards," etc., must be composed of non-citizen Indians. When such tribe has its members made United States citizens the so-called tribe is no

longer a tribe of aliens or wards, and being a member of such tribe does not make such member less than a citizen any more than being a member of the Tribe of Israel or of Tammany would make a citizen of the United States any less a citizen.

Something must be conceded to the frailty of the English language, and when for convenience we now speak of a "Cherokee," or a "member of the Cherokee Nation," we must not be understood to mean anything less than a United States citizen; when we speak of the Cherokee Nation we must not be understood to mean anything less than *a body of United States citizens on the final approved rolls of the late Cherokee Nation.* When we speak of the Cherokee tribal government we must not conceive a tribal government of aliens or wards or anything more than the attenuated vanishing form which we have described.

But the attorneys representing the United States insist that the enabling act admitting the State of Oklahoma was intended to reassume jurisdiction by the United States over these citizens of the United States, members of the late Five Tribes, because in paragraph 1 the following language was used:

> "Provided that nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the INDIANS of said territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting *such Indians,* their lands, property, or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this act had never been passed."

and because of paragraph 3 of section 3, which provides:

> "That the people inhabiting said proposed State do agree and declare that they forever disclaim *all right and title in or to* any unappropriated lands lying within the boundaries thereof, and to all lands

> lying within said limits owned or held by any *Indian, tribe, or nation;* and that until the title *to any such public land* shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposition and control of the United States."

These reservations as to "any Indian, tribe or nation" cannot be held to apply to persons **who are not Indians under the law.** They are merely the usual reservations common to all enabling acts, by which the United States reserves its rights in relation to its wards. Such reservations are purely formal, and have no reference to United States citizens of Indian blood any more than the liquor law referred to John Butler, the full-blood Kickapoo Indian in the Heff case.

Under the decision in the Heff case, even if Congress *had had the purpose* of reducing to a condition of pupilage those of Indian blood who had been *previously emancipated* by the grant of citizenship, *Congress would not have had the power to do so. But Congress had no intention* to decitizenize a hundred thousand persons who were acknowledged citizens by the implication of these usual formal reservations common to all enabling acts.

IT FOLLOWS THE UNITED STATES IS NOT GUARDIAN OF THE MEMBERS OF THE LATE CHEROKEE TRIBE AND HAS NO CAPACITY TO ACT AS SUCH.

Some comfort is found by the Government solicitors in the recent divided opinion of the Court of Claims, where the majority of the court (Muskrat and Dick *vs.* U. S., No. 330, in considering the authority of Congress over the UNALLOTTED PROPERTY, held as follows:

> "We must *assume* that Congress had some purpose in keeping alive the tribal government until March 4, 1906, and by subsequent acts continuing the same in full force for all purposes under existing laws until all the lands of the nation and the funds to its credit shall have been allotted and distributed.

"By these acts the Government asserted *its continued guardianship* until the final distribution of the common property."

Muskrat & Dick *vs.* U. S. (Rec., 32, § 3).

The court here *"assumes"* Congress *had some purpose* (in the Joint Resolution of March 2, 1906, and in the act of April 26, 1906) in extending the tribal existence and tribal governments "for all purposes *authorized* by law," and *declares* this purpose to be to *assert "its continued guardianship."*

In Brown and Gritts *vs.* U. S. (No. 330) the Court of Claims, having "assumed" a fatal error in the Muskrat case, proceeded to *"assume the validity* of those provisions continuing the tribal existence and tribal government of the Cherokee Nation in force and effect until all property of said nation shall have been distributed among the individual members thereof," [Brown and Gritts *vs.* U. S. (Rec., 36, § 4),] and thereby *"assumed"* the *validity* of an act of Congress which the court had just declared to have had the purpose to *assert* the *continued guardianship* of Congress over the Cherokees (*supra*).

The answer to all this is:

1st. That Congress had relinquished its guardianship by the grant of citizenship (Heff case, 197 U. S., 488), and had no such thing as a *"continued guardianship"* to assert.

2d. That such guardianship, once relinquished by the deliberate act of Congress, cannot be reassumed without the consent of the individual Indian and of the State (*In re* Heff, 197 U. S., 488).

3d. That the Joint Resolution of March 2, 1906, and the act of April 26, 1906, extending the tribal government "for all purposes authorized by law" did not contemplate reassuming a guardianship systematically and deliberately relinquished, as heretofore abundantly shown (*supra*).

The tribal existence and the tribal government might exist in fullest measure, every member being a United States citi-

zen, without the slightest inconsistency and without establishing any guardianship over "wards," any more than the existence of an authorized community of Quakers holding communal property in a Federal district would make every citizen stockholder a personal ward and decitizenize him.

What were the *"purposes authorized by law,"* however, for which the "tribal government" was extended?

When the act of April 26, 1906, became a law the only function left by that act was for the designated Principal Chief to sign his name to patents, and in the event he did not do so the Secretary of the Interior had a right to appoint some other citizen of the Cherokee Nation to sign such patents (34 Stats., 139, sec. 6). The tribal courts had been abolished by the Curtis Act in 1898. Every tribal function had been destroyed by that act. After the term of office of the Principal Chief and other officials of the Cherokee Nation then in office expired they no longer had any commission from the Cherokee people to represent them. The only purposes authorized by law remaining unfulfilled was the distribution by the United States of the undistributed tribal property, and for this reason the joint resolution of March 2, 1906, only extended the tribal existence *until the tribal property was distributed.*

Nowhere appears any "purpose authorized by law" whereby the continuance of the so-called tribal government should reduce the members of such tribe from the superior political status of citizens of the United States to the inferior political status of domestic dependent aliens or wards.

The plea upon which the tribal existence and tribal governments were extended "for all purposes authorized by law" was SOLELY that if "the tribal existence" and "tribal governments" ceased, it might be construed to be abandonment of the undistributed tribal property, which would thus revert to the United States, become public domain, and be claimed by the M., K. & T. R. R. Company.

It will be remembered that *in the Cherokee* Patent of 1838

a provision was inserted that the land should revert to the United States if the Cherokee Nation became extinct.

The M., K. & T. R. R. Co. claimed the land whenever the Indian title reverted to the United States. To prevent this possibility, which it was represented by the Interior Department to Congress might occur the moment the tribes "ceased to exist," the Joint Resolution of March 2, 1906, and section 28 of the act of April 26, 1906, "extending the tribal existence" were passed. [Cong. Record, Feb. 28, 1906, Vol. 40, part 4, pp. 3120, 3222.]

The Court of Claims, by the jurisdictional act in the Muskrat-Dick and Brown-Gritts cases, was charged with the duty of determining the validity of the McCumber Amendment (passed on theory of guardianship) in the following terms, to wit: "To determine the validity of ANY acts of Congress passed since the act of July first, nineteen hundred and two, in so far as said acts or any of them, *attempt to increase or extend* the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September 1, 1902," etc.

The McCumber amendments were based on theoretical guardianship, which the Cherokees vigorously denied, and of which Congress entertained so serious a doubt that it immediately afterwards authorized these suits for the express purpose of testing the validity of any of its acts based on this theory of guardianship.

The Court of Claims, in determining this delicate question, says (Rec., 32, par. 3),

> "We must assume that Congress had some purpose in keeping alive the tribal government until March 4, 1906, and by subsequent acts continuing the same in full force for all purposes under existing laws until all the lands of the nation and the funds to its credit shall have been allotted and distributed. By these

> acts the Government *asserted its continued guardianship* until the final distribution of the common property."

It is a fatal error to hold that the Government asserted its continued guardianship. It had no guardianship, after the act of March 3, 1901, granting full citizenship. The Government's relation thereafter was merely that of an agency authorized to distribute the property owned by these citizens of the United States and to distribute it in accordance with the terms of the contract expressed in the act of July 1, 1902. The Court of Claims assumes that the purpose of Congress was to assert a continued guardianship.

No such assumption is necessary and no such guardianship existed. If, however, the joint resolution of March 2, 1906, and section 28, of the act of April 26, 1906, extending tribal existence had the purpose of asserting the guardianship over these people it was the duty of the Court of Claims under the jurisdictional act to find such legislation of March 2, 1906, and section 28, of the act of April 26, 1906, invalid for the very reason that such laws on this theory attempted to set up a guardianship over citizens of the United States.

By assuming the validity of these acts and the assertion of guardianship valid it necessarily follows that the court must find the McCumber amendment valid, which merely exercised the guardianship assumed by the court to exist. The Court of Claims having been directed to judicially ascertain the validity of the McCumber amendment, has in effect, assumed the validity of that statute by assuming as a premise that Congress had by valid statute *asserted continued guardianship.*

The Court of Claims concludes:

> "It follows that we must hold that the act of April 26, 1906, as amended, is a valid statute, though we may add that if we entertained doubt, *we should, nevertheless, incline to resolve all doubt in favor of*

the validity of the statutes, leaving the Supreme Court to finally determine the question." (Italics ours.)

The error of the court consisted in *assuming* that the statutes of March 2, 1906, and April, 1906, asserted guardianship, and assuming that they were valid although asserting guardianship, and then interpreting the validity of the McCumber amendment, which was based on the assertion of guardianship, in the light of such assumption.

The court was further misled by using as precedents Worcester *vs.* Georgia, 6 Pet., 515; U. S. *vs.* Kagama, 118 U. S., 375; Cherokee Trust Funds, 117 U. S., 288; Lone Wolf *vs.* Hitchcock, 187 U. S., 553; Cherokee Nation *vs.* Hitchcock, 187 U. S., 294—every one of which deals with Indians at that time occupying the status of aliens and wards, and not occupying the status of United States citizens, and therefore misleading in determining the status of people who had become by law citizens of the United States.

United States Not Grantor Nor Trustee of the Title

Another class of cases, which are urged by Government counsel, are cases above cited, where the United States as grantor and as trustee of the title has brought an action to defend the estate held in trust, such as the case of the United States *vs.* Rickert, 188 U. S., 432.

Smith *vs.* Stevens, 10 Wall., 321.

Beck *vs.* Flournoy Live Stock and Realty Co., 65 Fed., 35.

United States *vs.* Flournoy Live Stock & Realty Co., 71 Fed., 576.

United States *vs.* Thurston County, 143 Fed., 287.

National Bank of Commerce *vs.* Anderson, 147 Fed., 87.

United States *vs.* Dooley, 151 Fed., 697.

In the Rickert case the United States as grantor held the title in trust for 25 years and as trustee had a right to defend it against interference by State taxation.

Government counsel offers the case of Smith *vs.* Stevens, 10 Wallace, 321, as an authority that Congress may by subsequent legislation control the disposition of lands granted to an Indian and still under his ownership.

The plain fact is that Congress itself made the grant to Victoria Smith in 1860 of the title to a piece of land previously held by occupant right and accompanied such grant with the proviso that it should not be sold except through the Secretary of the Interior. Her sale to Stevens directly was held void. In other words the United States as grantor imposed a condition upon the grant as it had a right to do and enforced it, and it has no application to the case at bar where the United States was not grantor and did not impose a condition.

Moreover, in the Smith *vs.* Stevens case the United States made no attempt to attach any subsequent condition, but only enforced the condition imposed at the time of the grant.

In the Thurston County case, the Anderson case and the Flournoy cases and in the Dooley case the United States was holder of the property in trust and had a right to defend it. None of these cases have any relation to the case at bar for the reason that the United States is not a trustee of the title, was not grantor and did not impose any restrictions as grantor and had no capacity to impose restrictions in the capacity of guardian.

Cases Where the United States Retained Jurisdiction of the Locality.

Much emphasis is laid by Government counsel upon the following cases:

United States *vs.* Celestine, 215 U. S., 278;
United States *vs.* Sutton, 215 U. S., 295.
Dick *vs.* United States, 208 U. S., 340.

These cases have no force for the reason that in the Celestine case the United States exercised jurisdiction over Bob Celestine because the crime was committed on an Indian reservation of which the United States had exclusive jurisdiction, and, moreover, Bob Celestine was not a citizen of the State nor subject to the laws of the State.

In the case of Dick *vs.* The United States the United States had expressly retained jurisdiction over the land allotted to the extent of prohibiting the sale of liquor thereon, and was the valid exercise of a treaty right. The case of Sutton was of like purport.

Even where the Indian is an alien and a ward and the United States is grantor no subsequent interference by Congress or by the Secretary is valid.

In the Jones *vs.* Meehan case, 175 U. S., 1, the United States having granted Moose Dung a reservation which descended to his son Moose Dung, Jr., conveyed this non-citizen Indian a good title. He leased it to Meehan Brothers for $25 per annum, and several years afterwards leased it to Jones. Congress authorized the Secretary of the Interior to approve the Jones lease. The Secretary approved it for $400 per annum. This honorable court held the act of Congress and the act of the Secretary invalid as proposing to interfere with a vested right.

The Argument of Incompetency.

It has been urged by Government counsel and by the Court of Claims that the full-blood Cherokees are incompetent to manage their own property without the supervision of the Secretary of the Interior; that they are uneducated, unable to speak the English language, and are in danger of "designing persons;" that they are in the main in favor of the extension of the restrictions (Findings 14 and 16); that Brown and Gritts have never been granted authority to represent the Cherokee nation or any of the enrolled citizens thereof *except as provided by the jurisdictional act.* (Findings of Fact 12, 14, 16.) These findings rest upon the testimony of a few partisan witnesses. Such testimony is immaterial, and the facts so found are immaterial.

Judge Howry, in his dissenting opinion (Rec., 43), says in regard to this:

> "The partisan statements of the few individuals who have undertaken to testify should no more influence the action of the court on the constitutional question than the report of the Senate Committee on the same subject (predicated upon two volumes of printed testimony) to the effect that the later legislation was unwise and injurious to the Cherokees."

Citizens of the United States cannot be thus deprived because of their race and blood of their constitutional rights or of vested property rights or of personal privileges and immunities on the theory that they are by blood and race incompetent. The courts of the country give full and adequate protection to all incompetents, and such an act of legislature is not due process of law.

This honorable court will take judicial notice that as far back as 1830, in the case of the Cherokee Nation *vs.* Georgia, it was recited in the record of that case that the Cherokees, then almost entirely full-blood Indians, had a written con-

stitution, modeled on that of the States, with their government divided into legislative, executive, and judicial branches; that they were regarded by the government of the United States as entirely competent to transact their own affairs and support themselves; that they had their own churches and schools; that they had ceased to be hunters, and were farmers and stock raisers and mechanics, with teachers and preachers, with lawyers and doctors of their own people; that they had all the habits of civilized life, with orchards and gardens and cultivated farms; with domestic animals and fowls, making their own living, and recognized by the United States as entirely competent to do so. They had even invented at that time a phonetic, syllabic alphabet which all Cherokees could read. They had a printing press of their own, printing both the English and Cherokee languages, publishing a newspaper of their own. These people have had every advantage of education from that time to this, over eighty years. They have so intermingled with the white race that out of 37,000 enrolled Cherokee citizens only a little over 8,000 are enrolled as full-blood Indians.

The Congress of the United States authorized Brown and Gritts, who are full-blood Cherokees, to bring this suit, and no better authority to appear for the full-bloods is possible. No full-blood has intervened to question the propriety of the suit or to raise any objection whatever.

Credit is given the solicitor for appellees in the case of the United States *vs.* Allen, 179 Fed., 13, for assistance rendered in the preparation of this brief and for data furnished and for matter quoted from the brief filed by him in that cause.

It is urged that the judgment of the Court of Claims, dismissing the petition of Brown and Gritts, and overruling their motion for a new trial, should be reversed.

CHARLES WEST,
Attorney General of the State of Oklahoma.

EXHIBIT A.

(Copy.)

Com'r.

DECEMBER 2, 1910.

Hon. CHARLES WEST,
Attorney General, Guthrie, Oklahoma.

SIR: I am glad to give you the following information, at the request of Senator Owen:

Full-blood Allotments, June 30, 1909, *Five Tribes.*

Tribe.	Full-blood population, 6-30-09, rep't'd by Com'r to Five Tribes.	Average acreage of allotments.	Approximate total area allotted to full bloods.
Cherokee	8,698	110	956,780
Chickasaw	1,540	320	482,800
Choctaw	8,420	320	2,694,400
Creek	6,835	160	1,093,600
Seminole	1,255	115	144,325
	26,748		5,371,905

Sincerely yours,
(Signed) R. G. VALENTINE,
Commissioner.

R. E. S.